THE CENTRAL LAW JOURNAL

SEYMOUR D. THOMPSON, Editor. } ST. LOUIS, FRIDAY, MARCH 12, 1875. { Hon. JOHN F. DILLON, Contributing Editor.

In the case of Lownsberry v. Rakestraw, which we elsewhere publish, our readers will find an interesting and important decision of the Supreme Court of Kansas, on questions growing out of titles to lands derived through Indian patentees. In the Western states and territories many questions are daily arising out of the conflicts between settlers and the Indians, under the various treaties whereby the usufructuary Indian titles have been extinguished. The right to enquire into the sufficiency of the grounds upon which patents have been awarded by the "chiefs and headmen," and other tribunals provided for the decision of questions arising under these treaties, has been very generally asserted by the district courts of Kansas. The supreme court in this case, however, denies such right, and places these tribunals on the same footing as other courts and officers vested with a discretion.

Political Articles.—One of our city subscribers writes us a courteous letter objecting to the tone of an article in our issue of February 26, on the Arkansas case. We are inclined to think, on reading the article again, and considering how the language would strike the reader, that his objection is well taken. The difficulty of writing articles of this kind, is, that it is almost impossible to eliminate, in the discussion of questions which relate to current constitutional history, matters of constitutional law from party politics. Considering this difficulty, and the manifest needs of our readers, we shall endeavor to avoid such discussions hereafter in the columns of the Journal, and shall labor to keep it more closely in the groove of practical usefulness.

In the Southern Law Review, articles on questions of political science and constitutional policy, written by eminent jurists, will occasionally appear. Thus, we are now putting in type, for that periodical, the fourth and last of a very valuable series of articles on Modern Theories of Government, by Chancellor Cooper, of Tennessee; and also an able paper by an eminent constitutional jurist, on the "Legal Aspects of the Louisiana Case."

Right of Action for Injuries Resulting in Death.

The opinion in Sullivan v. Union Pacific Railroad Co., (1 Cent. Law Jour. 595), has called out considerable comment. Most of the criticism has been favorable, and the main objection which has been urged against it is that it disregards a settled rule of the common law. West. Jurist for January, 1875.

If the question is not concluded by previous adjudications, it is admitted on all hands that the view taken in the opinion in Sullivan's case, is, on principle and reason, correct.

Let us see how the question stands. The civil law, and the French and Scotch law founded upon it, give the right to such an action, notwithstanding the death.

So in the courts of admiralty, which are not bound by the common law adjudications, whatever they may be on the point under consideration, and are free to decide according to natural justice, concur in holding that actions like the present are maintainable. Cutting v. Seabury, 1 Sprague, 522. In Hiner v. The Sea Gull, 2 Law Times R. 15, heard before the late Chief Justice Chase, in the Maryland circuit, the husband sued in admiralty for the death of his wife, and the right of action was sustained. And see, also, Price v. Highland Light, decided in the same court, 2 Law Times R. 118, and Plumer v. Webb, Ware, 80. It is observable that in none of the judgments which rest upon the supposed common law doctrine, is there any attempt to support the doctrine upon grounds of reason or justice or policy.

It is a settled principle of the English law, that if a servant or minor child is injured by the negligence of the defendant, so as to be disabled from rendering service, an action, by the master or father, lies for the loss thereby occasioned. Hodsall v. Stalebrass, 11 Ad. & El. 301.

It is also settled in such a case, that if the servant or child injured, should, after the lapse of a year, or other stated period, die, the master or father would have his action, notwithstanding the death; but it is said, on the authority of Baker v. Bolton, 1 Campb. 493, that the damages can only be considered down to the moment of dissolution. This conclusion is, obviously, illogical, and it is unsound on legal principles. From what does the cause of action arise? Clearly from the *negligent act* of the defendant, which produces the injury, and not from the *death* of the person, subsequently resulting from the negligence. If the negligence of the defendant permanently maims the servant or child, but does not kill it, entire damages may be prospectively assessed. All damages growing out of the wrongful act, though in point of time they will not occur until after the judgment, may be taken into consideration. As to this, the cases agree, and Hodsall v. Stalebras, *supra*, is precisely in point.

This being so, why does the supervention of death, a month or a year after the negligent act of the defendant, which negligent act is the ground of the action, necessarily limit the estimate of damages to those that have then happened to the master, father or husband?

Lord Ellenborough answered this question in Baker v. Bolton. He told the jury that the plaintiff, a husband, could only recover damages for the loss of his wife's services during "the period of her existence," and gave as a reason that "in a civil court the death of a human being cannot be complained of as an injury." But the action was not for the death, but for the negligence, and the damages in such an action are not for the death, but for the loss of service which the defendant's negligence caused, and it is quite immaterial whether the culpable negligent act deprived the plaintiff of the loss of service by wholly disabling the servant injured, from lobor, or by depriving the servant of his life, and therefore of his power to serve.

It is evident, therefore, that the asserted principle, that the *death* of a human being cannot, at the common law, be the basis of a civil suit, has no application to an action by the master, father or husband, for being wrongfully deprived of the loss of the service of his apprentice, minor child or wife.

It is admitted, that if the negligent act is not so great as to take life, the defendant is liable to the master or father for

the loss of service thereby occasioned, but it is contended that if the wrongful act is so great as to take life at once, then the master or father has no right and no remedy whatever against the wrong-doer. Certainly, those who contend that there is any such anomalous and unreasonable exception to the general principles of the law, ought to make out a clear case showing it. *The cases, English and American, all rest upon the nisi prius* decision of Lord Ellenborough on Baker v. Bolton, the *facts of which are* confessed to be "loosely stated" (L. R. 8 Exch. 100, per Kelly, C. B.), and in which his lordship gives no reasons and cites no authorities for the proposition he advances—a proposition, which, as shown above, had no application to the case on trial. No prior case to that effect can be found in the English books, unless Higgins v. Butcher, Yelv. 89, be so regarded, and if so, it proceeded upon the now exploded doctrine that the felony drowned the private action. White v. Spettigue, 13 M. & W. 603; Wells v. Abrahams, Law Rep. 2 C. P. 615; Osborn v. Gillett, Law Rep. 8 Exch. 88. So that it remains true that the English law reports contain no prior case supporting the doctrine of Baker v. Bolton. It is also true that no prior case can be found in the English books laying down a contrary doctrine. Is the conclusion a just one, because no previous cases can be found, that Lord Ellenborough must be assumed to have declared a correct and well-known principle of the common law? If any such principle of law was well known and established, the law reports or treatises of eminent lawyers would contain evidence of it. But there is no case declaring the broad principle asserted by Lord Ellenborough, nor is it asserted in the elementary works. On the contrary, Mr. Smith, in his excellent works assumes the contrary. Master and Servant, 3 ed. 139

The American cases generally follow Baker v. Bolton. But there are decisions the other way. Shields v. Yonge, 15 Ga. 349; James v. Christy, 18 Mo. 162; Ford v. Monroe, 20 Wend. 210; Plummer v. Webb, Ware 80.

It is, however, conceded that the current of American decisions is otherwise, but they all rest upon the authority of Baker v. Bolton, or the principle which is there declared. By those who conceive it to be the duty of a court to decide according to the greater number of adjudicated cases, the conclusion in Sullivan's case will be regarded as erroneous. But those who consider the law to be a science founded upon reason, by those who, while they reverence precedents, will not slavishly follow them, it may, perhaps be concluded that the court was right in refusing to carry into a new region an anomalous and indefensible principle of law, resting on so slight and questionable a foundation as Baker v. Bolton, without any prior, authentic evidence or memorial of its existence.

Spanish Land Titles Again.

We have evidently struck some one in the pocket. In the St Louis Globe, for the 3d instant, appears an editorial article calling attention to the article which appeared in a former number of this journal, under the head of "Spanish Land Titles" (*ante*, p. 134), and making several assertions concerning it, which we separate from each other and number as follows: 1. That the CENTRAL LAW JOURNAL is one of the best of its kind published in the country. 2. That the article in question was "admitted" into our columns. 3. That it was "scurrilous." 4. That it evidently was not written by "a clear-headed lawyer." 5. That it was not written by one prompted by any pure interest in the upholding of legal principles and the aims of justice. 6. That it was prompted by one who is personally interested in defeating the bill now before the legislature, and who desires to influence the legislature by representing it as a lawyer's trick, designed to subserve the purposes of the defendants in certain suits now pending in the courts of Saint Louis. 7. That the CENTRAL LAW JOURNAL has been guilty of "trickery."

We will proceed to answer the allegations of this bill of complaint in detail: 1. We admit that the CENTRAL LAW JOURNAL is one of the best journals of its kind published in the country. 2. We deny that the article in question was "admitted" into our columns; but on the contrary, we assert that it was written by the editor of this journal. 3. We deny that it was "scurrilous." 4. We have not any knowledge or information sufficient to enable us to form a belief as to whether or not the article in question was written by "a clear-headed lawyer," and we leave the plaintiff to make such proof under this head as may be material. 5. We deny that the article in question was not written by one prompted by any pure motive in upholding legal principles and the aims of justice; but, on the contrary, we assert that his sole motive in writing it was to uphold legal principles and the aims of justice. 5. We deny that the article in question was "prompted" by any one, or that the writer of it is personally interested in the matter to which it relates; but we assert that it was written without consulting any one upon the subject, or without even knowing the name of the honorable gentleman who introduced the bill; and that it was written under a strong and honest conviction that the purpose of the draftsman of the bill was to manufacture evidence to enable him to succeed in certain suits now pending. 7. We deny, and despise the assertion, that in writing that article we were guilty of "trickery."

Having thus answered in detail the allegations of the complainant's bill, we now propose to set up certain facts by way of new matter: 1. We charge that the Globe editorial was not written by the editor of that journal, but that it was written by a prominent lawyer of Saint Louis. 2. That the said lawyer is of counsel *for the defendants* in certain suits pending in the courts of Saint Louis, known as Hammond's heirs against Lindell's heirs, Conway's heirs against Lindell's heirs, and the Board of Public Schools against Lindell's heirs, involving the title to a tract of land of great value near the corporate limits of Saint Louis. 3. That the said lawyer or some of his associates, is the author of the bill in question. 4. While we accord the most upright intentions to the member of the legislature who introduced the bill, who, we are assured, is incapable of anything which savors of trickery or fraud, and who has, in the columns of the Saint Louis Republican of February 20th, put forward the only substantial arguments in its favor which we have seen, yet we fully believe, on evidence intrinsic and extrinsic, that the object of the counsel who drew the bill, was to change the rules of evidence *in the interest of the defendants* in the above named suits against Lindell's heirs.

First let us examine the *intrinsic* evidence: (1.) The testimony is to be admitted only "in suits pending." The suits

against Lindell's heirs are "pending." (2.) Such evidence is to be admitted only on the part or in behalf of *defendants*. Lindell's heirs are defendants. (3.) In order to be entitled to avail themselves of this testimony, such defendants must have had ten years possession—not ten years *adverse* possession. Lindell's heirs, at the time of the bringing of these suits against them had had more than ten years naked possession, but less than ten years adverse possession. It may be said that if they had had ten years *adverse* possession, they would not have needed this evidence, since their title would have been thereby perfected under the statute of limitations; yet it is nevertheless seen, that the bill in this particular, fits their case.

Secondly, the *extrinsic* evidence which induces us to believe that the bill in question was framed by the gentleman indicated, and for the purpose indicated, is that this has been distinctly charged in the Saint Louis Republican of the 6th instant, and, up to the time of our going to press, has not, so far as we have heard, been publicly denied.

So much by way of answer. Now, by way of explanation, we will say that we do not charge corrupt motives upon the counsel whom we suppose to be the author of this bill. We fully recognize the fact that a lawyer—particularly a good and faithful lawyer, may become so wrought up with zeal for his client's interests, that measures which, to disinterested persons would seem the very essence of injustice, might seem to him perfectly just and proper; and such may be the case before us.

This question is a local one, and not of interest to many of our readers. It would not be proper, therefore, for us to consume much space in its discussion, even though our information enabled us to enter into its details intelligently. But it frequently happens that courts of equity refuse to hear evidence and dismiss suits "for want of equity on the face of the bill." On a similar principle it seems to us that the bill "to quiet titles to land" contains on its face vices which should condemn it in the mind of every right thinking man. It raises to the grade of evidence a class of testimony which the Supreme Court of Missouri and the Supreme Court of the United States have deliberately repudiated. It lets in this evidence at the instance of naked ten years' possessors of even part of the land in controversy, and denies the same right in other cases to the most meritorious of heirs suing for their patrimony. This is foul play. In all candor and fairness, if these old affidavits are capable of being used in the elucidation of the truth, why not allow any party to introduce them, and let them speak for what they are worth, according to the rules of evidence? Again, a bill which seeks to change the rules of evidence so as to give the advantage to one of the parties in a pending suit, is special legislation in its most pernicious form, although it may assume the specious garb of a general law. Furthermore, this bill raises to the dignity of evidence affidavits which were taken in proceedings between the United States and certain claiments, and permits them to be used against claimants who were not parties to the proceeding in which they were taken, either by themselves or those through whom they claim. It thus violates that familiar and necessary rule of evidence that depositions taken in a suit or proceeding between A. and B., cannot be used in evidence in a proceeding between different parties, or even between B. and C.

Nor is it true, as stated in the Globe editorial, that the provision in the acts of Congress, under which the testimony named in this bill was taken, was "intended to be a method for perpetuating the evidences of the possessions of the various claimants under the Spanish and French governments prior to 1803, so as to vest the title under the treaty." These acts nowhere speak of perpetuating testimony. The object of taking this testimony was simply to furnish evidence to the proper department of the government on which it might proceed in confirming the titles of these ancient possessors. As fast as the titles of the respective claimants were confirmed, the testimony adduced by them accomplished its object, spent its force and became *functus officio;* and the attempt now, after the lapse of half a century, to revive it by legislative enactment for other and different purposes, and to conclude the rights of those whose ancestors, devisors and grantors were not parties to the proceeding, were not notified to attend, had no opportunity to cross examine the witnesses, or to adduce counter-testimony, would be a wanton and uncalled-for infraction of one of the soundest principles upon which justice is administered.

Since the above was written, we have seen an editorial in the Globe, of the 8th instant, which states that this bill has been approved by the bar association. This is a mistake. It has never been discussed by the bar association, nor has it been approved by the committee of that association, on the amendment of laws. We have conversed with several members of the bar with reference to it, and have yet to meet one who is in favor of it.

Taxation in Aid of Private Enterprises.

[Concluded from last week, page 159.]

II. THE COMMERCIAL NATIONAL BANK OF CLEVELAND, OHIO, PLAINTIFF IN ERROR, v. THE CITY OF IOLA, IN THE COUNTY OF ALLEN AND STATE OF KANSAS.

Supreme Court of the United States, No. 741.—October Term, 1874.

In error to the Circuit Court of the United States for the District of Kansas.

Mr. Justice MILLER delivered the opinion of the court.

The only difference between this case and that of the Citizens' Bank v. Topeka, just decided, is that the bonds were issued before the general act of February 29, 1872, there being at that time no statute of Kansas which professed to authorize the proceeding.

But after the vote in favor of issuing the bonds, an act of the legislature ratified the vote and authorized the city officers to deliver the bonds and to levy the taxes necessary to pay their principal and interest. They were issued to a private corporation to aid in constructing and operating foundry and machine shops.

This is all that is necessary to be said, and it shows that the case comes within the principle of the one just decided, and that the judgment of the circuit court holding the bonds void must be affirmed.

THE CITIZENS' SAVINGS AND LOAN ASSOCIATION OF CLEVELAND, OHIO, PLAINTIFF IN ERROR, v. THE CITY OF IOLA, IN THE COUNTY OF ALLEN AND STATE OF KANSAS.

Mr. Justice CLIFFORD dissenting.

Unable to concur either in the opinions or judgments in these cases, I will proceed to state, in brief terms, the reasons which compel me to withhold my concurrence.

Corporations, of a municipal character, are created by the legislature, and the legislature, as the trustee or guardian of the public interest, has the exclusive and unrestrained control over such a franchise, and may enlarge, diminish, alter, change, or abolish the same at pleasure.

Where the grantees of a franchise, as well as the grantors, are public bodies, and the franchise is created solely for municipal objects, the grant is at all times within the control of the legislature, and consequently the charter is subject to amendment or repeal at the will of the granting power. Hartford v. Bridge Co., 10 How. 534; 2 Kent Com. (12th ed.), 275; Bissell v. Jeffersonville, 24 How. 294; Darlington v. Mayor, 31 N. Y. 187; Granby v. Thurston, 23 Conn. 416.

Errors of indiscretion which the legislature may commit in the exercise of the power it possesses, cannot be corrected by the courts, for the reason that the courts cannot adjudge an act of the legislature void unless it is in violation of the federal or state constitution. Benson v. Mayor, 24 Barb. 248; Clark v. Rochester, 24 Id. 446; Bank v. Rome, 18 N. Y. 38.

State constitutions may undoubtedly restrict the power of the legislature to pass laws, and it is plain that any law passed in violation of such a prohibition is void, but the better opinion is, that where the constitution of the state contains no prohibition upon the subject, express or implied, neither the state nor federal courts can declare a statute of the state void as unwise, unjust or inexpedient, nor for any other cause, unless it be repugnant to the federal constitution. Except where the constitution has imposed limits upon the legislative power, the rule of law appears to be that the power of legislation must be considered as practically absolute, whether the law operates according to natural justice or not in any particular case, for the reason that courts are not the guardians of the rights of the people of the state, save where those rights are secured by some constitutional provision which comes within judicial cognizance; or, in the language of Marshall, chief justice, "the interest, wisdom and justice of the representative body furnish the only security in a large class of cases not regulated by any constitutional provision." Bank v. Billings, 4 Pet. 563; Cooley on Const. (2d ed.), 168; Calder v. Bull, 3 Dall. 398.

Courts cannot nullify an act of the state legislature on the vague ground that they think it opposed to a general latent spirit supposed to pervade or underlie the constitution, where neither the terms nor the implications of the instrument disclose any such restriction. Walker v. Cincinnati, 21 Ohio St. 41.

Such a power is denied to the courts, because to concede it would be to make the courts sovereign over both the constitution and the people, and convert the government into a judicial despotism. Golden v. Prince, 3 Wash. C. C. 313.

Subject to the federal constitution the legislature of the state possesses the whole legislative power of the people, except so far as the power is limited by the state constitution. Bank v. Brown, 26 N. Y. 467; People v. Draper, 15 N. Y. 532.

Our own decisions are to the same effect, as appears by one of very recent date, in which the court says that "the legislative power of a state extends to everything within the sphere of such power, except as it is restricted by the federal constitution or that of the state." Pine Grove v. Talcott, 19 Wall. 676.

Apply those principles to the case before the court, and it follows, as it seems to me, that the judgment in each case should be reversed for the following reasons: (1) Because the demurrer to the declaration in each case should have been overruled. (2) Because the bonds, to which the coupons sued on were attached, were issued in pursuance of the express authority of the legislature vesting that power in the corporation defendants. (3) Because the constitution of the state does not, in any manner, prohibit the passage of such a law as that under which the bonds were issued. (4) Because it is not competent for a federal court to adjudge a state statute void which does not conflict in any respect with the constitution of the United States or that of the state whose legislature enacted the statute.

Unwise laws, and such as are highly inexpedient and unjust, are frequently passed by legislative bodies, but there is no power vested in a circuit court, nor in this court, to determine that any law passed by a state legislature is void if it is not repugnant to their own constitution nor the constitution of the United States.

Vague apprehensions seem to be entertained that unless such a power is claimed and exercised inequitable consequences may result from unnecessary taxation; but in my judgment there is much more to be dreaded from judicial decisions which may have the effect to sanction the fraudulent repudiation of honest debts, than from any statutes passed by the state to enable municipal corporations to meet and discharge their just pecuniary obligations.

NOTE.—The opinion of the circuit court will be found reported in 2 Dillon C. C. R. 353.

Titles Derived from Indian Patentees.

GEORGE LOWNSBERRY v. J. W. RAKESTRAW.

Supreme Court of Kansas, January, 1875.

Hon. Samuel A. KINGMAN, Chief Justice.
" David J. BREWER, } Associate Justices.
" D. M. VALENTINE, }

[Syllabus by the Court, BREWER, J.]

1. **Conclusiveness of Judgments.**—Where the determination of any question involving discretion is committed to any officer or tribunal, his or their decision within the limits of jurisdiction conferred is conclusive thereof, and can be attacked collaterally only for fraud.

2. ——. **Designation of Patentees by Chiefs and Head-men of Indian Tribe.**—So where it was provided by treaty that the Osage "half-breeds," "not to exceed twenty-five in number, who have improvements on the north half of the lands sold to the United States, shall have a patent, * * * * * * said half-breeds to be designated by the chiefs and head-men of the tribe;" *held*, that the designation by such chiefs and head-men, was conclusive as to the right of the party designated to receive a patent, and that in a suit brought by the grantee of such patentee to recover possession of the land, no enquiry could be made into the question whether such patentee was a half-breed of the Osage tribe, or whether he had any improvements on the north half of the lands sold to the United States.

3. **Effect of Selection by Designated Half-Breed, and Approval by Secretary of Interior.**—Where it was also provided by treaty that such designated half-breeds should receive patents for eighty acres each, "to include as far as practicable their improvements, * * * all of said lands to be selected by the parties subject to the approval of the secretary of the interior;" *held*, that a selection of an eighty acre tract by one of the designated half-breeds, and the approval of that selection by the secretary of the interior, gave to such half-breed a vested interest in the land, and was conclusive as against all persons claiming title acquired subsequently to the selection, and that the holder of such subsequently acquired title could not show as a defence to an action brought by the grantee of such half-breed, that such half-breed never had any improvements on the land.

4. **Effect of Mistake in Making Selection.**—Where the land selected was incorrectly reported to the secretary of the interior, the mistake could be corrected, even though the patent had already issued, and the correct selection submitted to his approval; but where the party making the selection is aware of the mistake, makes no objection thereto or effort to have it corrected, and assents to its submission to the secretary for approval; *held*, that such action was virtually a selection of the tract reported to the secretary.

All the justices concurring.

C. F. Hutchings, for plaintiff in error; *Stilwell & Baylies*, for defendant in error.

Opinion of the court by BREWER, J.

The material facts are as follows: On the 29th of September, 1865, the Osage Indians made a treaty with the United States, which was ratified and proclaimed January 21, 1865 (14 U. S. Stat. 687), by which they conveyed certain lands to the government, "to be surveyed and sold under the direction of the secretary of the interior, on the most advantageous terms for cash, * * * but

no pre-emption or homestead settlement shall be recognized; and after reimbursing the United States, the cost of said survey and sale, * * * the remaining proceeds of sales shall be placed in the treasury of the United States to the credit of the civilization fund," etc. See first article of the treaty. By the 14th article it is provided, "that the half breeds of the Osage tribe of Indians, not to exceed twenty-five in number, who have improvements on the north half of the lands sold to the United States, shall have a patent issued to them, in fee simple, for eighty acres each, to include, as far as practicable, their improvements; said half breeds to be designated by the chiefs and head-men of the tribes, * * * and all of said lands to be *selected* by the parties, subject to the approval of the secretary of the interior."

On the 10th of April, 1869, Congress passed the following joint resolution: "Resolved, by the senate and house of representatives of the United States of America, in Congress assembled, That any *bona fide* settler, residing on any portion of the lands sold to the United States by virtue of the first and second articles of the treaty concluded between the United States and the Great and Little Osage tribe of Indians, September 29th, 1865, and proclaimed January 21st, 1867, who is a citizen of the United States, or shall have declared his intention to become a citizen of the United States, shall be, and hereby is, entitled to purchase the same in quantity not exceeding one hundred and sixty acres, at the price of one dollar and twenty-five cents per acre, within two years after the passage of this act, under such rules and regulations as may be prescribed by the secretary of the interior.

"*Provided, however*, That both the *odd* and even numbered sections of said lands shall be subject to settlement and sale as above provided. And *provided further*, That the sixteenth and thirty-sixth sections in each township of said lands shall be reserved for state school purposes, in accordance with the provision of the act of admission of the state of Kansas. *Provided, however*, That nothing in this act shall be construed in any manner affecting any legal rights heretofore vested in any other party or parties."

In September, 1867, the twenty-five half breeds were "designated by the chiefs and head-men," and the lands selected by the parties, as provided in said 14th article. William Tinker was designated as one of these half breeds, made his selection, and thereafter a patent, for the land in controversy, was issued to him, of date June 10, 1870, which recites that it was issued under this 14th article, and shows the approval, on the 15th of June, 1869, by the secretary of the interior. On September 30, 1870, Tinker and wife deeded to Lownsberry, and this was his claim of title. In January, 1866, Rakestraw moved upon the land, made improvements upon it, and afterwards, having all the personal qualifications requisite, obtained a duplicate receipt for it, under the joint resolution of 1869, though this receipt was thereafter cancelled by the officers of the land office, as issued by mistake. It appears probable, from the testimony, that prior to Rakestraw's occupation, and prior to the treaty, there had been some improvements on the land, though whether owned by Tinker or not, is doubtful, but that all had been removed or destroyed prior to those dates. It was claimed that the land selected by Tinker was not the land embraced in the patent, and that, through some mistake or design, a change had been made intermediate to the selection and the patent. Upon these facts the court charged the jury as follows: "Should you, therefore, find, from the evidence, that on the 29th day of September, 1865 (that being the date of said treaty), the said William Tinker had no improvements, as hereinbefore defined, on the land in controversy, and that long prior to the issuing of said patent to Wm. Tinker for the land in controversy, the defendant, Rakestraw, had a lawful and *bona fide* settlement upon said land, as defendant has, in his answer, averred, the issuing of the patent to Tinker, in itself would not operate to divest defendant of any right he may have acquired before the issuing of said patent by virtue of settlement and improvements." It also refused this instruction: "If the jury find from the evidence, that the chiefs and head-men of the tribe, before the 10th day of April, 1869, designated William Tinker as one of the half breeds of the Osage tribe of Indians who should have a patent for 80 acres of land, under the provision of the 14th article of the treaty of September 29, 1865, and that the said Tinker selected the land in controversy before the 10th of April, 1869, and his selection was afterwards approved by the secretary of the interior, then the said Tinker had, on the 10th of April, 1869, a vested right in the land in controversy, and the defendant could obtain no title to the same, as against Tinker or his grantees by purchase, under the joint resolution of Congress, approved April 10, 1869." The same rulings appear elsewhere in instructions given and refused. In their brief, counsel for Rakestraw say: "The fact that said Tinker was designated as one of the twenty-five of the Osage tribe of Indians entitled to patents, is not questioned by defendant in error, as the case now stands, but the two vital points we rely on in opposition to his right to rightfully receive a patent for the land in controversy, are: 1. That he never had any *improvements* on said land; and, 2. That he never *selected* said land as his head-right."

In these rulings, we think the learned court erred. Prior to April 10, 1869, Rakestraw's possession and occupancy gave him no rights in the land. He was simply a naked trespasser, whose possession, no matter how long continued, could never ripen into a title. Wood v. The M. K. & T. R. W. Co., 11 Kansas, 323. It is, therefore, so far as respects the occupancy by other parties, of any title from the United States, under the provisions of the treaty, as though the land were wholly unoccupied and vacant. While it is true that only such half-breed Osages as had improvements on the north half of the lands were to be entitled to patents, yet the treaty provided a tribunal for determining who should thus receive patents, and the determination of that tribunal is conclusive. Testimony is no more admissible to show that William Tinker was not an Osage half breed, or that he had no improvements on the north half of the lands, than it would be after the final determination of this case to show that the facts upon which the judgment was based did not exist. United States v. Arredondo, 6 Peters, 729. Counsel in their brief do not seem to contest this proposition, or, at least, do not rest their case upon any denial of it. Nor did the court instruct the jury in direct opposition thereto, though it refused an instruction asserting it, and did charge the jury that Tinker must have possessed the qualifications named, to be entitled to a patent. Such ruling would be very apt to convey a wrong impression to the jury. The treaty not only provided for designating the individuals, but for the selection of their lands, giving to the individuals named, the privilege of making this selection, subject only to the approval of the secretary of the interior; and while it contemplated that such relations should include their improvements, yet it did not make this absolutely inoperative. It says, "as far as practicable." It thus contemplated the possibility of selections outside of the improvements. Perhaps the selection of one half-breed would cover the improvements of another as well as his own. Perhaps other selections authorized by the treaty might conflict. Perhaps there might be conflicting titles to the same improvements. Whatever may have been the the reason, the fact is apparent that the treaty contemplated the possibility that some selections might not cover the parties' improvements; hence the mere fact that selections did not include the party's improvements would not necessarily defeat the selection. Again, it provided for a selection, subject to the approval of the secretary of the interior. Such approval was conclusive as against any rights which did not exist at the time of the selection. The approval related back to the selection and confirmed it. The title thus acquired was good as against any one who did not then have a better claim. The only parties who at the time had any interest or rights in the land, were the Osage Indians, the government and Tinker. No one else could question the validity of the selection. So that whether Tinker had any improvements on the land

at the time he made his selection, or not, is a matter into which Rakestraw, holding by a subseqently acquired title, cannot be permitted to enquire. This ruling compels a reversal of this judgment and the remanding of the case for a new trial. It will also have the effect of excluding, on such subsequent trial, much of the evidence offered on this.

The question of an error between the selection and the patent, we have not, as yet, considered, but perhaps should notice before closing. It is claimed that the land actually selected was the east half of the northwest quarter of section nine, instead of the land in controversy. It is true that if Tinker selected one piece of land, and, by mistake, another was reported to the secretary of the interior, for approval, the error could be corrected, even though the matter had gone so far as the issue of the patent; and the actual selection might still be submitted to the secretary for his approval; but it is equally true that if Tinker, before the 10th day of April, 1869, became aware of the fact that a mistake had been made in the tract of land reported as his selection, made no effort to correct the mistake, and assented to its being thus presented to the secretary for approval, it was virtually a selection by him of the tract reported; and the approval of the secretary confirmed the title in him, as of a date prior to any rights which Rakestraw could acquire by his occupancy. We do not care to pursue this enquiry further, for we cannot anticipate the testimony which may be offered on the next trial.

The judgment will be reversed and the case remanded for a new trial.

JUDGMENT REVERSED.

Negligent Use of One's Property—Injuries to Children by Unguarded and Unfastened Turntable.

PATRICK KEFFE v. THE MILWAUKEE AND SAINT PAUL RAILWAY COMPANY.

Supreme Court of Minnesota, January, 1875.

Hon. S. J. R. McMILLAN, Chief Justice.
" J. M. BERRY, } Associate Justices.
" GEORGE B. YOUNG, }

1. **The Case in Judgment.**—The defendant corporation owned and kept for the purpose of turning its engines, a turntable, which was built within forty rods of its depot building in a small town. It was left unlocked and unguarded, and children were in the habit of playing upon it. While so playing with other children, the plaintiff's foot was caught between the end of the rails and crushed: *Held*, that he was entitled to recover damages.

2. **Sic utere Tuo, ut Alienum non Lædas.**—The limits within which a person may use his property without being liable to pay damages for injuries which may thereby happen to others, elaborately discussed in the opinion of the court, and in the opinion of the court below.

The questions determined in this case arise on a motion for judgment on the pleadings. The action was brought by Patrick Keffe, by his guardian *ad litem*, John Keffe, to recover damages for an injury received by him while playing upon an unguarded and unfastened turn-table, owned and kept by the defendant. The principal allegations of the complaint were that the plaintiff was an infant seven years of age; that the defendant, in connection with a railroad owned and operated by it, used and operated a certain turntable in the town of Northfield, state of Minnesota, in which town the plaintiff resided; that said turntable was so constructed and arranged as to be easily turned around and made to revolve in a horizontal direction.

That across the upper surface thereof there were fastened two large and heavy bars of iron, corresponding with the iron rails of the railroad track used in connection with said turntable, and so placed and arranged that, when the turntable revolved, the ends of the iron bars running across the face of the same, passed by the ends of the rails on said railroad track, which rails on the end of said railroad track next to said turntable and said track, were supported by a wall or abutment, between which walls or abutments said turntable revolved.

That adjacent to said turntable, on said abutment or wall and said railroad track, were fastened two other bars of iron (being the rails on said railroad track), and corresponding with said rails laid as aforesaid across the upper surface of said turntable, and so placed and arranged that when the rails on said turntable were in a line with said rails on the railroad track, said rails on said railroad track and abutments or walls, were in a line with the rails on said turntable.

That the surface of said abutments or walls, adjacent to said turntable, was within two inches of the upper and outer portion of the same, and corresponding with the arc thereof. That said turntable was situated in a public place, near to a passenger depot of the defendant, and within 120 feet from the residence and home of plaintiff; that many children were in the habit of going upon said turntable to play; that said turntable was unfastened, and in no way protected, fenced, guarded or enclosed, to prevent it from being turned around at the pleasure of small children, although the same could at all times be readily locked and securely fastened; that said turntable, abutments, or walls and fixtures, were in the possession and under the control of defendant, and not necessary in operating said railroad, and it was the duty of said defendant to keep said turntable fastened, or in some way protected so that children could not readily have access thereto and revolve the same; that the same was not so protected or fastened, and that said turntable when left unfastened was very attractive to young children, and that while the same was being moved by children, and at all times when left unfastened, it was dangerous to persons upon or near to it; that defendant had notice of all the aforesaid facts, before and at the time the injury herein named occurred to this plaintiff.

That plaintiff, on or about the 11th day of September, A. D. 1867, was a child of tender years, without judgment or discretion, he being at said date seven years old, and that in consequence of the carelessness, negligence and improper conduct of said defendant in not locking, enclosing or otherwise fastening said turntable, and by the negligence, carelessness and improper conduct of said defendant, its agents and servants, in allowing said turntable to be and remain unfastened, insecure and improperly put in motion, it was, at the date last aforesaid, revolved by other children over whom the parents and guardians of plaintiff had no control and without their knowledge, and, while being so revolved, the plaintiff being on said turntable, had his right leg caught near the knee, between the surface of said turntable and said abutment or wall, and between the iron rail on said turntable and the iron rail on said abutment or wall, and said leg was thereby so bruised, broken, mangled and fractured that it became and was necessary to amputate said leg, and in order to save the life of said plaintiff the said leg was amputated at a point about four inches above the knee.

That said injury was caused by the negligence, carelessness and improper conduct of said defendant, its agents and servants aforesaid, and without any carelessness, fault or negligence on the part of the plaintiff or the parents or guardian of said plaintiff.

That, in consequence of said injury, plaintiff's life was endangered, and he suffered great pain and prostration of body from the time of said injury until more than one year thereafter, and, by reason of said injury said plaintiff, Patrick Keffe, became and was and is a cripple—and is thereby prevented for life from obtaining his livelihood by pursuing any active employment.

The defendant answered these allegations as follows: by admitting that before and up to the month of October, 1867, the defendant in connection with its railroad, used and operated the turntable referred to in the complaint; that said turntable was located on its lands in the town of Northfield, and that the same

was constructed substantially as the complaint alleged; but denied that it was situated in a public place or near to a passenger depot of the defendant; but alleged that the same was remote from any public place, and from any traveled highway or street, and was distant forty rods from any passenger depot.

The defendant had not any knowledge or information thereof sufficient to form a belief, whether or not children were in the habit of going upon said turntable to play; but averred that such children did not go upon the same at any time with the consent or by the permission of the defendant, its officers or agents, but that such children went unlawfully, if at all, upon the same, and against the will, commands and remonstrances of the defendant's officers and agents, as they and their parents and guardians well knew.

The defendant denied that the turntable was unfastened or unprotected; but averred that the same was at all times, when not in actual use for the turning of engines, properly fastened and protected, and was so fastened and protected in the usual manner, and in the same manner and in all respects as securely as turntables are and always have been fastened and protected upon railroads that are carefully and prudently constructed, managed and operated.

The defendant also denied that the said turntable could at all times be locked; but alleged that the keeping the same locked was impracticable, and inconsistent with the reasonable and free use thereof, and is unusual on railroads constructed and operated with care and prudence; admitted that the said turntable and its abutments and fixtures were in the possesssion and under the control of the defendant at all times, unless the same were unlawfully and without the consent or permission of the defendant, its officers or agents, entered upon or interfered with by other persons; denied that it was unnecessary in operating said railroad, but averred that the same was useful and necessary for the proper operation of said railroad; denied that it was the duty of said defendant to keep said turntable fastened or protected so that children or any other trespassers could not readily have access thereto, and revolve the same; but the defendant alleged it was the duty of children not to intermeddle with the said turntable, and of their parents and guardians to keep them from intermeddling therewith.

The defendant also denied that the said turntable was not so protected or fastened that children could not revolve the same; but alleged that the same was at all times, when not in actual use, kept so fastened that neither children nor adults could revolve the same without first removing the fastenings thereof.

The defendant also denied that the said turntable while being moved by children or adults, or when unfastened, was dangerous to persons upon or near it; on the contrary, the defendant says that persons upon or near it while it was being revolved, or while it was at rest, in the exercise of proper care, were in no danger at all of injury; the defendant also alleged that the said Patrick Keffe was, at the time he received the injury referred to, residing, and always before that time resided with his father, the said John Keffe, and his mother, at Northfield, and was under their care and protection, and that on the said 11th day of September, 1867, the said Patrick Keffe and certain other children and persons to the defendant unknown, did unlawfully and without the knowledge or consent of the defendant, its officers or agents, and in violation of express notice and remonstrance before that time given and made by the servants and agents of the defendants to them, go upon the said turntable and unfasten and revolve the same, and that while they were so wrongfully engaged in revolving the same, the said Patrick Keffe, in attempting to step from one of the abutments upon the said turntable, through his own gross carelessness and negligence, permitted his leg to be caught between the said turntable and said abutment, whereby he received the injury referred to in the complaint; and that the said parents of the said Patrick did carelessly, negligently and unlawfully, and against the remonstrances and injunctions of the agents and servants of the defendant before that time given to them, permit and suffer the said Patrick to go upon, unfasten and revolve the said turntable as aforesaid, and so to attempt to step from said abutment upon said turntable while the same was in motion.

The defendant also denied that the said injury was caused by any negligence, carelessness, improper conduct or fault of said defendant, its officers, agents or servants; on the contrary the defendant alleged that the same was caused by the said carelessness, negligence and wrongful and improper conduct of the said Patrick and his said parents; and denied that the plaintiff had been damaged in any sum whatever.

The defendants moved for judgment in their behalf on the pleadings, which motion was granted by the court, Hon. William Sprigg Hall, presiding.* The plaintiff appealed.

Mead & Thompson, for appellant, filed an excellent printed argument.

Bigelow, Flandrau & Clark, for respondent.

*See note at end of case.

YOUNG, J., delivered the opinion of the court.

In the elaborate opinion of the court below, which formed the basis of the argument for the defendant in this court, the case is treated as if the plaintiff was a mere trespasser, whose tender years and childish instincts were no excuse for the commission of the trespass, and who had no more right than any other trespasser to require the defendant to exercise care to protect him from receiving injury while upon its turntable. But we are of opinion that upon the facts stated in the complaint, the plaintiff occupied a very different position from that of a mere voluntary trespasser upon the defendant's property, and it is therefore necessary to consider whether the proposition advanced by the defendant's counsel, viz: that a landowner owes no duty of care to trespassers, is not too broad a statement of a rule which is true in many instances.

To treat the plaintiff as a voluntary trespasser, is to ignore the averments of the complainant that the turntable which was situate in a public (by which we understand as open, frequented) place was, when left unfastened, very attractive, and when put in motion by them was dangerous to young children, by whom it could be easily put in motion, and many of whom were in the habit of going upon it to play. The turntable being thus attractive, presented to the natural instincts of young children a strong temptation, and such children, following, as they must be expected to follow, those natural instincts, were thus allured into a danger whose nature and extent they, being without judgment or discretion, could neither apprehend nor appreciate, and against which they could not protect themselves. The difference between the plaintiff's position and that of a voluntary trespasser capable of using care, consists in this, that the plaintiff was induced to come upon the defendant's turntable by the defendant's own conduct, and that as to him the turntable was a hidden danger, a trap.

While it is held that a mere licensee "must take the permission with its concomitant conditions, it may be perils" (Hounsell v. Smith, 7 C. B. (N. S.) 731; Bolch v. Smith, 7 H. and N. 736), yet even such licensee has a right to require that the owner of the land shall not knowingly and carelessly put concealed dangers in his way. Bolch v. Smith, per Channell and Wilde, BB.; Corly v. Hill, 4 C. B. (N. S.) 556, per Willes, J. And when one goes upon the land of another, not by mere license, but by invitation from the owner, the latter owes him a larger duty. "The general rule or principle applicable to this class of cases, is that the owner or occupant is bound to keep his premises in a safe and suitable condition for those who come upon and pass over them, using due care, if he has held out any inducement, invitation or allurement, either express or implied, by which they have been led to enter thereon." Per Bigelow, C. J., in Sweeney v. Old Colony and Newport R. R. Co., 10 Allen, 368; reviewing many cases; and see Indermaer v. Dames, 1 L. R. (C. P.) 274; S. C. 2 L. R. (C. P.) 311.

Now, what an express invitation would be to an adult, the temptation of an attractive plaything is to a child of tender years. If

the defendant had left this turntable unfastened *for the purpose* of attracting young children to play upon it, knowing the danger into which it was thus alluring them, it certainly would be no defence to an action by the plaintiff who had been attracted upon the turntable and injured, to say that the plaintiff was a trespasser, and that his childish instincts were no excuse for his trespass. In Townsend v. Wathen, 9 East. 277, it was held to be unlawful for a man to tempt even his neighbor's dogs into danger, by setting traps on his own land, baited with strong-scented meat by which the dogs were allured to come upon his land and into his traps. In that case Lord Ellenborough asks what is the difference between drawing the animal into the trap by his natural instinct, which he cannot resist, and putting him there by manual force? And Gross, J., says: "A man must not set traps of this dangerous description in a situation to invite his neighbor's dogs, and, as it were, to compel them by their instinct to come into the trap." It is true that the defendant did not leave the turntable unfastened for the purpose of injuring young children, and if the defendant had no reason to believe that the unfastened turntable was likely to attract and to injure young children, then the defendant would not be bound to use care to protect from injury the children whom it had no good reason to suppose were in any danger. But the complaint states that the defendant knew that the turntable, when left unfastened, was easily revolved; that when left unfastened it was very attractive, and when put in motion by them, dangerous to young children; and knew, also, that many children were in the habit of going upon it to play. The defendant, therefore, knew that by leaving this turntable unfastened and unguarded, it was not merely inviting young children to come upon the turntable but was holding out an allurement, which acting upon the natural instincts by which such children are controlled, drew them by those instincts into a hidden danger; and having thus knowingly allured them into a place of danger without their fault (for it cannot blame them for not resisting the temptation it has set before them), it was bound to use care to protect them from the danger into which they were thus led, and from which they could not be expected to protect themselves.

We agree with the defendant's counsel that a railroad company is not required to make its land a safe play-ground for children. It has the same right to maintain and use its turntable that any land-owner has to use his property. It is not an insurer of the lives or limbs of young children who play upon its premises. We merely decide that when it sets before young children a temptation which it has reason to believe will lead them into danger, it must use ordinary care to protect them from harm. What would be a proper care in any case must, in general, be a question for the jury upon all the circumstances of the case.

The position we have taken is fully sustained by the following cases, some of which go much further in imposing upon the owner of dangerous articles the duty of using care to protect from injury children who may be tempted to play near or meddle with them, than it is necessary to go in this case. Lynch v. Nurdin, 1 Q. B. 29; Birge v. Gardiner, 19 Conn. 507; Whirley v. Whiteman, 1 Head. 610. It is true that in the cases cited the principal question discussed is not whether the defendant owed the plaintiff the duty of care, but whether the defendant was absolved from liability for breach of duty by reason of the fact that the plaintiff was a trespasser who, by his own act, contributed to the injury; and the distinction is not sharply drawn between the effect of the plaintiff's trespass as a bar to his right to require care, and the plaintiff's contributory negligence as a bar to his right to recover for the defendant's failure to exercise such care as it was his duty to use. But as a young child, whom the defendant knowingly tempts to come upon his land, if anything more than a technical trespasser, is led into the commission of the trespass by the defendant himself, and thus occupies a position widely different from that of an ordinary trespasser, the fact that the courts, in the cases referred to, assumed instead of proving, that the defendant owed to a young child, under such circumstances, a duty he would not owe to an ordinary trespasser, for whose trespass he was not in any way responsible, does not weaken the authority of those cases. And in Railroad Co. v. Stout, 17 Wall. 657 (a case in all respects similar to the present), the distinction insisted on by counsel is taken by Mr. Justice Hunt, and the circumstance that the plaintiff was in some sense a trespasser, is held not to exempt the defendant from the duty of care. In the charge of the learned circuit judge at the trial of the last named case (reported under the title of Stout v. Sioux City and Pacific R. R. Co., 2 Dillon, 294), the elements which must concur to render the defendant liable in a case like the present are clearly stated.

In Hughes v. McFie (2 Hurlst. & Colton, 744), and Mangan v. Allerton (1 L. R. Exch. 239), cited by the defendant's counsel, there was nothing to show that the defendants knew or had reason to apprehend that the cellar-lid, in the one case, or the crushing machine in the other, would be likely to attract young children into danger. It must be conceded that Hughes v. McFie, is not easily to be reconciled with Birge v Gardiner, and that Mangan v. Allerton seems to conflict with Lynch v. Nurdin; but whether correctly decided or otherwise, they do not necessarily conflict with our decision in this case. Much reliance is placed by the defendant on Phila. and Reading R. R. Co. v. Hummell, 44 Penn. 378, and Gillis v. Penn. R. R. Co. 59 Penn. 129.

In the first of these cases, the plaintiff, a young child, was injured by coming upon the track while the cars were in motion. The only negligence charged upon the defendant was the omission to give any signal at or after the starting of the train. If the plaintiff had been crossing the track through one of the openings which the company had suffered the people in the neighborhood to make in the train while standing on the track, and the cars had then been run together upon him without any warning, the case would more nearly resemble the present; but the facts, as they appear, show that the company used abundant care, and that it had no reason to suppose that the plaintiff was exposed to danger, and the decision is put on the latter ground, although Strong, J., delivering the opinion of the court, uses language which lends some support to the defendant's contention in this case. Gillis v. Penn. R. R. Co. was properly decided on the ground that the company did nothing to invite the plaintiff upon the platform, by the fall of which he was injured, and that the platform was strong enough to support the weight of any crowd of people which the company might reasonably expect would come upon it. Neither of these cases is an authority against, while a latter case in the same court (Kay v. Penn. R. R. Co. 65 Penn. 271), tends strongly to support the plaintiff's right of action in this case, and the recent case of Pittsburgh A. & M. Passenger Railway Co. v. Caldwell, 74 Penn., 421, points in the same direction.

It was not urged upon the argument that the plaintiff was guilty of contributory negligence, and we have assumed that the plaintiff exercised, as he was bound to do, such reasonable care as a child of his age and understanding was capable of using, and that there was no negligence on the part of his parents or guardians contributing to his injury. JUDGMENT REVERSED.

NOTE.—We could not add a more acceptable note to this case than to give the elaborate opinion of the learned Judge who presided in the court below. It presents very fully the opposite side of the question, and is as follows:

HALL, J.—This motion involves questions both important and difficult; yet it seems to me that the difficulty proceeds rather from some contrariety of opinion expressed in analogous cases and some conflict of decisions than in the application of well established principles to the facts as alleged.

It appears that a child of tender years at play with other children on a turntable, erected on the property of the defendant and used by it in the prosecution of its business, was injured by the turning of the table by the other children, and brings suit through its guardian, for the damage sustained.

It is alleged that the turntable was in a public place, near a passenger depot, was attractive to children, many of whom were in the habit of going upon it to play, that it was left unfastened and in no way protected, fenced, guarded or enclosed, to prevent its being turned by small children, and this is claimed to have been such negligence on the part of the defendant, as to render it liable for the injury sustained,

It will thus be seen that the case primarily involves the use of property by the owner, and the extent to which such use is limited by a disregard to the rights of others, either in the enjoyment of their property or otherwise.

And in reference thereto, the following propositions would seem to be fairly sustained both by reason and authority.

First—The owner has the absolute right to use his property as he pleases, except so far as the effect of such use may be to invade or infringe some right existing in another.

Second—That the owner cannot be held responsible for injuries, arising through the negligent use or management of his property, by one who has placed himself in such a position that, as to him, such owner owes no duty.

And, indeed, to limit the use or extend the liability further, would go very far towards rendering the possession of property something rather to be avoided than desired. All that can reasonably or legally be expected of any owner is, so to manage and use his property as carefully to avoid any injury to the property or rights of others, and no one can have any ground upon which to base a complaint of such use and management, unless thereby he can show himself to have been injured in his property or rights. I may erect a nuisance upon my premises, and my neighbors may have ground of complaint, for they have a right to enjoy the free air or water, as the case may be, untainted through act of mine, but he can have no cause of complaint who neither resides nor has property within any possible range of the effect of such nuisance. So I may not obstruct the highway around and about my premises, though the fee be in me, for the public has a right of free passage over such highway, and any one may recover damages for any injury arising from such obstruction. And no one may have the right so negligently to use and manage his property as to cause damage to another lawfully on the premises; but the night-prowler who falls into a ditch, or the wayfarer, who to shorten his journey, crosses without leave, private property and suffers injury merely through the negligent management of the owner, can have no cause of action, for in regard to neither is any duty imposed upon the owner. No right pertaining to either of them is infringed or violated, for they would have no right to be upon the premises, and inasmuch as such injury would not have happened but for their presence, it may be said to have arisen from their own wrong.

There is a series of cases in England which have resulted in supporting a cause of action for injuries inflicted, though at the time of such injuries the party injured was himself a trespasser. Dean v. Clayton, 2 English Common Law Rep. 461; S. C. 7 Taunt, 489; Ilott v. Wilkes, 5 English Common Law Rep.; 3 Barn & Ald. 304; Bird v. Holbrook, 13 English Common Law Rep. 667; 7 East, 628.

These cases have arisen from the acts of the owners of property who have set springs, guns or traps within their premises for the purpose of inflicting injury upon trespassers; and from an examination of them it will be seen that the right of action is founded upon one or all of the following considerations: 1. That the acts of the owners were willful. 2. That the punishment was incommensurate with the offence; and 3. That it was forbidden upon grounds of humanity. See remarks of Best, Ch. J., in Bird v. Holbrook, cited *supra*. 4. That the owner, if present, would not be justified in shooting or inflicting grievous injury upon such trespassers. 5. And he could not do indirectly that which would be unlawful, if done directly.

But even in these extreme cases the courts of England have held, that, if the trespassers had notice of the presence of such dangerous instruments, they would invade the premises at their own risk.

We have a case in this country following these English decisions, except upon the question of notice. The defendant to prevent the plaintiff's fowls from trespassing upon his land, as they had before done, mixed Indian meal with arsenic, and spread it upon his land, having given the plaintiff previous notice that he should do so; and such fowls coming afterwards upon the defendant's land, ate the poisoned meal, in consequence of which some of them died; and it was held: 1. That the previous notice, in contradistinction to notice after the fact, was sufficient. 2. That notwithstanding such notice, the defendant was not justified in the use of deadly means, and consequently was liable in damages. Johnson v. Patterson, 14 Conn. 1; S. C. Self Defence Cases, 878. The decision of the court was based principally upon the fourth and fifth points mentioned above. But none of these cases are, nor do they pretend to be, in conflict with the principles with which we started.

In Dean v. Clayton, cited *supra*, which was an action for the loss of the plaintiff's dog, which was killed by running against a dog-spear, while chasing a hare on the defendant's land, and in which the court were equally divided upon the question whether the plaintiff could maintain an action for the damage—all the judges, giving separate opinions, quote with approval the case of Blyth v. Topham, in Roll. Abr. 88, and stated to be reported in Cro. Jac. 158. Says Burrough, J., who favored the action, "here I think proper to take notice of Blyth v. Topham, Cro. Jac. 158. The declaration stated, that defendant dug a pit in his common, by means whereof the plaintiff's mare, being straying, fell into it, and perished. This was held to be naught, for when the mare was straying, and plaintiff shows not any right why it should be there, the digging of the pit was lawful as against him. I answer to this, that for anything that appears contrary, 1. The digging of this pit was lawful against everybody. 2. There is no intention to produce damage to anybody stated or suggested in the case. 3. The default was wholly in the plaintiff permitting his mare to stray. If this had been held to be actionable, a man could not use his own land. He could not procure chalk for the manure of his own land, without peril of being ruined by the neglect of others."

And Park, J., who also favored the action, says: "A case from Cro. Jac. of Blyth v. Topham, has been much pressed by my brother Bosanquet. The same case is mentioned in Roll. Abr., 88. If A. seized of a waste adjoining the highway, dig a pit in the waste within 36 feet of the highway and the mare of B. escapes into the waste, and falls into the pit and dies there, yet B. shall not have an action against A.: for his making the pit in the waste and not in the highway was not any wrong to B., but the fault of B. himself, that his mare escaped into the waste." The judge further states that the case differed from the one under consideration, in that B. was the faulty person and that it did not appear that the pit was dug *for the purpose of killing mares*.

And in the Connecticut case, *supra*, the court say: "This is not a case in which the destruction of the plaintiff's property resulted from acts done by the defendant, in the ordinary use of his own, without any intention to do the injury complained of; as in Blyth v. Topham, Cro. Jac., 158, where a stray horse fell into the pit made by the defendant in the common; or in Bush v. Brainerd, 1 Cowen, 78, where the cow of the plaintiff, trespassing on the defendant's land, was killed by drinking maple sugar in the defendant's sugar works."

And the principles upon which these cases, last above mentioned, are founded, have been widely recognized in this country. In Howland v. Vincent, 10 Met. 371, an owner of land made an excavation therein, within a foot or two of the public street, and used no precaution against the danger of falling into it. A person

passing by in the night time, went over the line of the street, fell into the excavation and was injured, and it was held that the owner was not liable. The court say: "We know of no principle of common law requiring him to fence the premises, in the condition in which they then were, and have seen no by-laws of New Bedford imposing duties upon the abuttors of the highways in matters of like nature with this."

And the distinction made where a right exists in the plaintiff, and where there is no such right, is well illustrated by comparing this case with that of Homan v. Stanley, 66 Pa. St., 464. Here the owner of the adjacent lot extended his excavation under the sidewalk as far as the curbstone, and, neglecting to put up guards, the plaintiff was injured thereby; and it was held that he could recover for the damage, for he had a right to the use of the street and was lawfully there. So, likewise in Lowell v. The Boston and Lowell R. R. Co., 23 Pick. 24, where the railroad was constructed across the highway and the company negleted to replace the barriers, which had been put there by the corporation for the protection of the public.

In Caulkins v. Matthews, 5 Kansas 191, the plaintiff allowed his horse to go at large. The horse wandered on the uninclosed land of the defendant, and fell into an old well, which caused his death. The court below charged, that the defendant was liable if negligent. Judgment was reversed, upon the ground that the defendant, at most, could be held liable for gross negligence.

In the U. P. R. R. Co. v. Rollins *et al.*, 5 Kansas, 167, the plaintiff allowed his cattle to graze upon the open, uninclosed prairie near the defendant's track—the land on both sides of which belonged to the defendant, and they strayed upon the track and were killed by the train. The court say: "Ordinarily, when a person allows his cattle to run on another's land, without the owner's consent, the owner of the land is not liable for any injury to the cattle received whilst there, unless the injuries are caused through his gross negligence. But when any person knowingly allows his cattle to run on the land of a railroad company, in the vicinity of a railroad track, he can recover for injuries done to the cattle only through the most gross and wanton negligence of the railroad company." There is, possibly, some little confusion of the terms in the last two cases, but we are to understand by gross negligence, such a degree of negligence as would lead in the law to the implication of willfulness or wantonness, they are easily understood, and may be reconciled to the English cases above cited.

And so in case of Harty v. Central R. R. Co. 42 N. Y., 468, the company was held to owe no duty of love towards persons walking on the track 200 feet from a crossing.

In Locke v. The First Div. of the St. Paul & Pacific R. R. Co., 15 Minn. 350, which was an action to recover damages for killing plaintiff's cow on the railroad track, the court held: That the common law by which every man is bound to keep his cattle on his own land, is in force in this state, and that the cow was on the track by plaintiff's default. And from the language of the court, "that the burden of proof is on the plaintiff to show that the train was carelessly managed after the peril of the animal was discovered," it may be inferred that in a proper case, and in the absence of statute, the court would hold defendant liable only for such negligence as would show wilfulness or wantonness.

But it cannot be disguised that there are decisions in several of the states in conflict with the cases above cited, and which increase, if they do not produce, the difficulties surrounding the case under consideration.

Thus in Illinois, where it had been held for some years, as in C. M. & T. R. R. Co. v. Rockefellow, 17 Ill. 541, that a railroad company is not liable for the want of ordinary care and diligence in running its trains, whereby stock upon the road is killed, but only for wanton, wilful and gross negligence.

The court reversed this ruling in Ill. Cent. R. R. Co. v. Middleworth, 46 Ill. 494, wherein they say: "Much reflection has satisfied us that the doctrine of these cases is liable to severe and great criticism. * * * The idea is not tolerable that any injury may be inflicted, which, by ordinary care and diligence, could have been avoided,"

But why not, if the party injured has, by his own act, placed himself in such a position towards the other that the latter could not be held to owe him the duty of care, without rendering the ownership of property both annoying and hazardous? It certainly is as tolerable that the party who, through his own act of wrong or folly, brings upon himself an injury, should be remediless, as that the owners of property should be held to the constant exercise of care, in order to avoid injury to mere wrong-doers. And Judge Redfield, in his Notes to Railway Cases, page 645, deems himself justified in speaking as follows: "And it seems that the fact that the person, or property, as cattle, are trespassing at the time the injury occurs, will not subject them to damage without redress, provided there is no such wrong on the part of the person, or of the owner of the property, as to contribute directly to the injury; not that the other party might not with care have avoided it." To support this proposition he refers to the following cases: Isbell v. N. Y. & New Haven R. R. Co., 27 Conn. 393; Daley v. Norwich & Worcester R. R. Co., 26 Conn. 591; Brown v, Lynn, 31 Penn. State, 510; C. C. & C. Railway Co v. Terry, 8 Ohio, St. 570 P. F. W. & C. Railway Co. v. Matthews, 21 Ohio St. 586. In the case in 27 Conn., which was a case of cattle killed by a train, the court seemed to treat the act of defendant as intentional, inasmuch as defendant was present by its agents or servants, and active in conducting the train, and saw or could have seen the cattle, and could have anticipated a collision, and in this connection say that no one has a right to shoot a trespasser, etc., etc. Now, whether the facts in the case justified that view of the matter or not, if the the decision was, as it would appear, based upon the theory that the injury was intentional, it would not conflict with the doctrine as we understand it.

But the case in 26 Conn. presents the question in a different, and, to some extent, a novel aspect. A child being on the track was run over in a city, and the court say: "If she was a trespasser, she was only technically so, and under the charge the jury must have found that she was moved only by the impulse of childish instinct, and was not old enough to be charged with fault or blame for being in a place of danger." But tender age or childish instincts have never been held to excuse children for the commission of trespasses, and the distinction between technical and active trespass has not yet been so defined in law as to render it safe to say that the one may not, and the other may exist, and the trespasser be entitled to maintain his action.

In the case in 8 Ohio, the question of trespass is not discussed, but only that of negligence, with which it seems to be confounded; and the case in 31 Penn. St., may, perhaps, be supported upon the fact found by the court below, that the plaintiff's boats, for an injury to which the action was brought, were moored on defendant's premises by his consent. See also B. & O. R. R. Co. v. The State, 33 Md. 542; State use of Caghlan v. B. & O. R. R. Co., 24 Md. 85; Bannon v. B. & O. R. R. Co., 24 Md. 109; Schmidt v. Milwaukee & St. Paul R. R. Co., 23 Wis. 186; Newham v. San F. & San Jose R. R. Co., 37 Cal. 409.

I think from an examination it will be found that the foregoing cases are liable to criticism in disregarding the subject of trespass, and treating the plaintiff as if he were rightfully in the place where the injury occurred, thereby making the whole question one merely of negligence, or in confounding the plaintiff's trespass with his contributory negligence, and considering the former of no moment unless it may have some effect in supporting the existence of the latter, or they turn upon some point which prevents their affecting materially the general doctrine above enunciated.

There was a case decided in England, some years ago, which has also tended very much to perplex the determination of later cases. In Lynch v. Nurdin, 41 Eng. Com. Law Rep. 422, it was

held that a child, who seeing a horse and cart in the street and unfastened, and got in the cart and was injured, could maintain an action against the owner of the team. In that case, the act of the child, except so far as connected with the question of contributory negligence, was not discussed, and the decision would seem to be founded upon the theory that the child had shown as much prudence as could be expected of him, and that the owner was guilty of negligence in leaving the horse and cart unfastened in the public street.

While this case has not been directly overruled in England, the later decisions are in direct conflict with it. In Mangan v. Atterton, 1 Ex. 238, the defendant exposed in a public place for sale, unfenced and without superintendence, a machine which might be set in motion by any passer-by, and which was dangerous, when in motion. The plaintiff, a boy four years old, by the direction of his brother, seven years old, placed his fingers within the machine, while another boy was turning the handle, which moved it, and his fingers were crushed. It was held that the plaintiff could not maintain an action for the injury, and Bramwell, J., seems to clinch the case, as follows: "Suppose," says he, "the machine was of delicate construction and injured by the boy, would he not be liable as tortfeasor? If so, it is impossible to hold the defendant."

And in Hughes v. McAffie, 2 Hurlstone & Coltman, 744, where a child, playing with a cellar-grating, which had been left standing against the wall of a house in the street, received an injury from its falling upon him, the court say: "Had he been an adult, it is clear, he could have maintained no action. He would voluntarily have meddled, for no lawful purpose, with that which, if left alone, would not have hurt him. He would, therefore, at all events, have contributed, by his own negligence, to his injury. We think that the plaintiff, being of tender years, makes no difference."

This brings us to the case of Birge v. Gardiner, 19 Conn. 587. The defendant had erected a gate on his own premises, but very near a lane, through which children were accustomed to go to school. The gate was improperly constructed, and a child going up to it and shaking it, the gate fell upon him, causing the injury of which complaint was made. The court treat the case as turning upon the negligence of the parties, and think it was properly left to the jury to say, whether the acts done by the child were not rather the result of childish instinct, which the defendant might easily have foreseen, and the latter was held liable for the damage. The court further say: "It was said in argument that plaintiff was a trespasser, although he was a child. We do not decide whether, in this case, the plaintiff was a trespasser or not. There are many acts, deemed acts of trespass, which involve civil liabilities, where there is no fault; and on the ground that where one of two innocent persons must suffer, he who is the proximate cause of the injury must be responsible first. But this is not a case between innocent parties. The gross negligence of the defendant is here the cause of action, and he alone is responsible for the entire consequence of it, unless there has been fault upon the part of the plaintiff." In reference to which statement, it may be observed, that the court would imply that, if during the commission of a trespass for which he would be civilly liable to the owner of the property invaded, the trespasser should be injured through the negligent use of such property by the owner, he might maintain an action against the owner for the damage arising therefrom. Whereas an examination of some of the earlier cases cited above would rather show the converse to be true, and that though such trespasser might, by statute, be relieved from such civil liabilities, yet that fact would give him no right upon the land of another, which could affect the latter in the management of his property. And it has been held in Kansas that the attempt to give any such right, would be unconstitutional, as tending to disturb vested rights. 5 Kansas, 191. Second, the court declines to determine the question of trespass, and holds that the cause of action is the gross negligence of the defendant. Whereas (unless gross negligence were held to imply unintentional wrong, in which sense, however, it does not appear to be used by the court) in all such cases, the gist of the action would seem to be, not the negligence of the defendant, but some invasion, infringement of, or injury to, some right of the plaintiff caused by the negligence of the defendant. Unless the plaintiff can show some right of his own violated, the negligence of the defendant must be immaterial to him and something of which he cannot be heard to complain.

As said by Gibbs, Ch. J., in Dean v. Clayton, *supra*; "I know it is a rule of law that I must occupy my own so as to do no harm to others; but it is their legal rights only that I am bound not to disturb. Subject to this qualification I may occupy or use my own as I please. It is the rights of others, and not their security against the consequences of wrong, that I am bound to regard." And further, in speaking of injuries to cattle, he says: "Their right to be there is the gist of the action; and in no instance has such an action been supported, where the cattle had no right to be in the place where they received the damage." See also The Chicago and Alton R. R. Co. v. McLaughlin, 47 Ill. 265; The Lafayette and Indianapolis R. R Co. v. Huffman, 28 Ind. 287; Wyatt v. Great Western Railway Co., cited on page 645, Redfield Railway Cases.

I think it will further appear, from the general current of the foregoing decisions, what reason itself would probably demonstrate, that a child by reason of its tender years or "natural instincts" can be invested with no *right* which, under like circumstances, would not be possessed by an adult. While, where the right exists a different degree—not kind—but degree of care may be required to avoid injury to such existing right, yet absence of discretion cannot, of itself, confer the right. In other words, a child can maintain no action for any injury by reason of its want of discretion which an adult could not maintain, to whom, in the particular instance, no want of discretion or no absence of the exercise of a proper discretion could be imputed. Suppose, then, an adult in crossing this property of the defendant, at night for example, and using proper care, had been injured at the turn-table from the absence of a plank which the defendant had neglected to replace. Could he have maintained an action against the defendant for the damage arising therefrom? Not, we suppose, if a railroad company is held, in the management and use of its property, only to the same degree of care as private individuals, unless controlled by statutory regulation. And it has been held that railroads and private individuals, with respect to the same subject-matter, are held to the exercise of the same degree of diligence in preventing injury to others. O. & M. R. R. Co. v. Shamfalt, 47 Ill. 497. There can be no doubt that a railroad company is obligated to provide safe means of ingress and egress to and from their cars for passengers, and has a duty to perform towards those who stand in such relation to them, or who are legally upon their premises upon business connected with the road. Holmes v. Northeastern Railway Co., 4 Ex. 254; Dillage v. N. Y. Central R. R. Co., 56 Barb. 30; Tabin v. Portland R. R. Co., 59 Maine; McDonald *et ux.* v. Chicago & N. W. R. R. Co., 9 Law Reg. 10.

But the distinction between these cases and those where the railroad company owes no such duty, is well illustrated by the case of Gillis v. The Penn. R. R. Co., decided by the Supreme Court of Pennsylvania, and to be found in 8 Am. Law Reg. N. S. 729. On the 14th of September, 1866, Mr. President Johnson and his party were coming from Pittsburgh on their way to Chicago, on a special train of the defendant's. At the request of some of the party it was arranged that the train should stop about five minutes at each of the several points along the road, Johnstown, where the accident occurred, among others, that the people might have an opportunity of seeing them. The train, on arriving at Johnstown, first stopped at the usual place, near the passenger

station, but it being supposed that in that position the people would not have a good opportunity to see and hear Mr. Johnson and his party, who were on the hindmost car, the train was immediately moved a short distance farther east. The crowd pressed onwards, collecting in very great numbers near the hindmost car, on that part of the platform over the canal, when the platform gave way and all on it, with the plank and broken timbers, were precipitated into the canal, a depth of twenty feet. Some were killed, and the plaintiff, among others, badly injured. He brought suit to recover damages. It was claimed that the timbers of the platform were rotten, and the structure insecure. The plaintiff was not, or intending to be a passenger on the train. The court below directed the jury to bring in a verdict for the defendant. Sharswood, J., delivered the opinion of the supreme court, and it may be well to observe, that, in contradistinction to the Connecticut case, above mentioned, it is held, that though the plaintiff was *not* technically a trespasser, yet he had no legal right to be on the platform, and he could not recover. Further, that the owner of property is not liable to a trespasser, or to one who is on it by mere permission or sufferance, for negligence of himself or servants, or for that which would be a nuisance in a public street or common, and that the owner is bound to have the approach to his house sufficient for all visitors on business or otherwise; but if a crowd gathers on it to witness a passing parade and it breaks down, though not sufficient for its ordinary use, he is not liable to one of the crowd who might be injured. After reviewing authorities in support of the foregoing propositions the learned judge refers to two Pennsylvania cases, and as I have been unable to procure the reports containing them, I quote his remarks, as supporting the general doctrine at issue: "But our own case of Knight v. Abert, 6 Barr. 472, is on all fours with them. It was there found that though no action lies in Pennsylvania for trespass by cattle pasturing on uninclosed land, yet that not being a matter of right, the owner of land is not liable for an injury sustained by such cattle falling into a hole dug by him within the bounds of his lands and left uninclosed. [Here we have the converse of the proposition assumed in 19 Conn., *supra*]: 'He who suffers his cattle to go at large,' says Ch. J. Gibson, 'takes upon himself the risks incident to it.' So must a person, using by permission or sufferance the private property of another, take upon himself the risk incident to it. To the same effect, if closely examined, is the Phil. & Read. R. R. Co. v. Hummell, 8 Wright, 378. The plaintiff below in that case was a boy of tender years, to whom no contributory negligence could be imputed. He was on the track of a railroad, not at a crossing. It was held that the railroad company, as to persons so on the track, were not bound to give any warning at starting. 'Blowing the whistle of the locomotive, or making any other signal,' said Mr. Justice Strong, 'was not a duty owed to the persons in the neighborhood, and consequently the fact that the whistle was not blown nor signal made, was no evidence of negligence.' And again: 'There is as perfect a duty to guard against an accidental injury to a night intruder into one's bed-chamber as there is to look out for a trespasser upon a railroad, where the public has no right to be.' "The learned judge also refers to the case of Lynch v. Nurdin, *supra*, and seems to think it can only be supported on the ground of nuisance, and that the decision would have been different had the team been left standing on an uninclosed lot and not on the public street.

And further in support of the general principles, which we claim to govern this case, reference may be had to the *nisi prius* case of Cox v. The Farmers' Market Co., in the District Court of Philadelphia, to be found in 9 Am. Law Reg. 104. Between two market houses there was a space 30 feet wide, running from one street to another. The space was paved both as a foot and cartway, and formed an open passage-way from street to street, which the public were in the habit of using, though both it and the market-houses were private property. The purpose of the company, in leaving open and paving the space, being plainly to accommodate customers, resorting to the market house. It was held that its acquiesence in the general use of the passage-way by the public was not a dedication to public use, and that a person going along this passage-way at night, after market hours, and falling down the steps of a basement opening on the passage-way, though there was a defect in the way, could not recover for the injuries suffered.

The court is referred to a charge, given to the jury in a similar case to the one under consideration, by the judge of the U. S. Circuit Court for Nebraska, to be found in Vol. 11, Law Reg. p. 228. But it will be observed that the court takes no notice of the allegation of the answer that the plaintiff had no right to be on the turntable and was a trespasser, and simply rests the case upon the negligence of the parties. The right of the plaintiff to be where he was, is confounded with the question of his contributory negligence. Yet the principles upon which each is founded are entirely distinct, and it would seem that the first must be found to exist before it becomes necessary to enquire into the latter. I agree, however, with the learned judge, that the question is not free from embarrassments, though I am disposed to think that many of them have arisen from this confusion of a right in the plaintiff, with his own negligence in contributing to the injury of such right.

There must be an existing right to be injured, before it can become a question whether such injury has been caused by his own or another's negligence.

Another source of embarrassment probably arises from the fact that it is apt to strike the mind, that from accidents of this nature, the community does stand in need of some protection. But, unless the court, from the application of some established principles of law, can educe such protection, resort must be had to another tribunal. It is, undoubtedly, competent for the legislature by virtue of its general police power to establish such regulations as may furnish such protection. But in the absence of any statute, I can find no principle of law which will support the action in this case.

Correspondence.

WOMEN AS COUNSEL.

EDITORS CENTRAL LAW JOURNAL:—In the "Curiosities of the Law Reporters," in your issue of Jan. 29th, it is said that in the Court of King's Bench, *women* were early engaged as counsel. I find nothing to support this extraordinary statement in the case referred to in Lord Raymond (1 Ld. Raym. Rep. 716), where *Mr.* (not *Mrs.*) Cheshyre was the counsel for the plaintiff. Under the Roman republic, women no doubt acted as advocates, but in England!—and the King's Bench—*Credat Judæus!* N.

Notes and Queries.

Will some of our readers be good enough to answer the following queries?

I. RIGHT OF REDEMPTION.

NEW YORK, March 8, 1875.

EDITORS CENTRAL LAW JOURNAL:—Suppose A. conveys to B. ten city lots lying along side each other, and to secure unpaid purchase-money, takes back a mortgage on the ten lots for $10,000; B. then conveys the ten lots to C. and D., who, by the terms of their deed from B., assume and agree to pay, as part of purchase-money, the $10,000 mortgage debt; C. then conveys the undivided one-half of the ten lots to E., who, by the terms of his deed from C., assumes and agrees to pay, as part of the purchase-money, *one-half* of the $10,000 mortgage debt; then D. and E. each convey to the other by deed of release and quit-claim, five of the ten lots; D. then mortgages five of the lots released and quit-claimed to him to Y. A. sues on the $10,000 mortgage debt, taking a personal judgment against B. only, but a decree of foreclosure against B. C. D. E and Y. The ten lots are sold in bulk at a judicial sale on the decree of foreclosure, and bought by C. who pays to the officers of the court the amount of the judgment, with interest and all costs up to the day of sale. In such a state of facts, is it commpetent to D. or E or Y., to redeem from C., without redeeming the ten lots? Do D. E. and Y. stand on like footing towards C., in respect of the right of redemption? S.

II. SATISFACTION OUT OF HOMESTEAD PROPERTY.

JACKSBORO, TENN.

EDITORS CENTRAL LAW JOURNAL:—A. conveyed to B. in trust, to secure

the paymeut of $300, two estates, X. and Y.; after which judgment was had against him in the circuit court, to satisfy which the sheriff levied execution on both estates. Upon the application of A., the sheriff set off the estate X. as a homestead, and sold Y. to satisfy the execution. C. purchased Y. at the sheriff's sale, with notice of B.'s trust. Either estate is amply sufficient to satisfy the trust.

Out of which estate should B. satisfy his trust? Would a court of equity decree a satisfaction out of the homestead?

There are doubtless abundant authorities on the subject, but our limited libraries out here in the brush and hills, don't afford them. Answer, if you please, and clear up the FOG.

III. HOMESTEAD ACQUIRED AFTER DEBT CONTRACTED

TOPEKA, KANSAS.

The constitution of the state of Kansas, sec. 9, art. 15, provides: "A homestead to the extent of one hundred and sixty acres of farming land, or of one acre within the limits of an incorporated town or city, occupied as a residence by the family of the owner, together with all the improvements of the same, shall be exempt from forced sale, under any process of law, and shall not be alienated without the joint consent of husband and wife, where that relation exists." A., who was a merchant, and insolvent and the head of a family, erected a dwelling house worth $6,000, on a lot less than one acre, in an incorporated city in Kansas; the dwelling was paid for out of A.'s business. Can the creditors, whose demands existed before the transfer of the debtor's monies into this house, subject this property to the payment of their debts? G.

IV. REMEDY TO RECOVER LEGACY—ANSWER TO G. W.

LOUISVILLE, KY., March 9th, 1875.

EDITORS CENTRAL LAW JOURNAL:—I would answer the questions of G. W., of Van Buren, Ark. (2 C. L. J. 162), as to remedy to recover legacy, by saying that the case would materially depend upon a question of local law as to the powers of the Arkansas Probate Court. If there were no debts to pay, ordinarily such courts could not order a sale of the ferry, without the presence of the mother and son as parties to the cause, nor without protecting their rights, by securing to them in the decree the same interest in the proceeds of the sale that they had in the ferry, in which event it *might* become the duty of the purchaser to see to the application of the purchase-money, under the rule of law laid down in 1st Leading Cases in Equity, Elliott v. Merryman, and notes.

Assuming, however, that the practice in Arkansas allows the probate court to decree a sale without this, and assuming that the administrator has the proceeds of sale in his hands and no debts to pay, I should say that the remedy was against him, by means of a suit on his official bond; that the son could not sue at all, because the legal title to the fund was in the mother as trustee; that she might be compelled to execute the trust if she ever accepted it, and if she did not, the son by proper proceedings may have another trustee appointed to protect his interest and carry the trust into effect.

If the probate court proceedings were such as I have supposed, and were valid under Arkansas law, the ferry could not be subjected to the payment of the legacy, though it could have been if the probate court had not acted.

If the mother accepted the trust, and failed to discharge her duty in respect to the $50, she would be responsible to the son, who, in an action by his next friend could recover the damages. See the following authorities:

Lasley v. Lasley, 1 Duvall, 119; Tiffany and Ballard on Trusts, etc., pp. 1, 356, 772, 783, 580 to 583, 614, 615; Perry on Trusts, secs. 305, 307, 313; Brewster v. Striker, 2 Comstock (N. Y.) 19 *et seq.*; Maddox v. Allen, 1 Metcalfe (Ky.), 499; Coleman v. Walker, 3 Metcalfe (Ky.) 67; 18 Pennsylvania (State) 303; and the valuable MSS. opinion of Kentucky Court of Appeals, 1874, in case of Day v. Grady.

That the Statute of Uses does not apply to the case under consideration, the authorities cited will also show. W. E.

Book Notice.

REPORTS OF CASES IN THE CIRCUIT AND DISTRICT COURTS OF THE UNITED STATES, FOR THE NINTH CIRCUIT. Reported by L. S. B. SAWYER, Counselor at law. Vol. 2. San Francisco: A. L. Bancroft & Co. 1875. pp. 751.

This volume is a collection of selected cases, determined in the federal courts for the Ninth Circuit, embracing the States of California, Oregon and Nevada, during the years 1871,-72,-73 and '74. The cases are usually of general interest and as useful, in the main, in other circuits as the one in which they arose. Many valuable adjudications upon Maritime, Commercial and Corporation law, are contained in the volume. We notice also some useful cases under the bankrupt act, and in relation to Taxation and Revenue. The federal judges in that circuit, by whom the opinions in this volume are prepared (Sawyer, circuit judge, Hoffman, Deady and Hillyer, district judges) have an established reputation throughout the country for learning and ability, and the work of the Reporter, embodying the labors of the Judges, has been very creditably performed. The book is excellently printed on white, strong paper. J. F. D.

Briefs.

[Members of the profession who send us briefs for notice will confer a great favor by giving their *address*, and by enclosing a brief statement of the points argued. That will save us much labor, avoid the danger of our making mistakes, and render it possible for us to notice briefs when we might not otherwise have time to do so. As it is sometimes convenient for us to cut extracts out of briefs, and as we desire to preserve all good briefs for binding, we should take it as a favor if those who send us briefs would enclose *two* copies.—Ed C. L. J.]

[By JAMES HAYWARD, ESQ., St. Louis.]

Entry of the Amount of a Check in a Pass-Book by Receiving Teller of the Bank on Which the Check is Drawn, is a Receipt for Collection Only.—The National Gold Bank and Trust Co., v. Marion J. McDonald, Supreme Court of California. Brief and argument for appellant by S. Heydenfeldt, Jr., pp. 17. The facts are as follows:

The defendant and one Barton were customers at plaintiff's bank. The defendant presented a check, drawn by Barton, against the plaintiff, to the receiving teller of said bank, and the amount thereof was entered by the teller, in defendant's pass-book. Barton had no funds at plaintiff's bank at this time, or subsequently. On the same day, during banking hours, said check was returned to the defendant, with a request to make good account overdrawn by the amount paid thereon. Defendant refused, claiming, that, by the clerk's entry in his pass-book, credit was given him for that sum, and the check taken in payment. Plaintiff claims that said entry was simply an acknowledgment of receipt, and that this check was taken, as is usual, for collection only; that in this transaction, the receiving teller bore the same relation to depositors at this bank as the depositors in any other bank, was equally ignorant of the state of the bank accounts, and so could not properly declare a check good, so as to receive it as a cash payment. The argument is full and satisfactory. [Address S. Heydenfeldt, Jr., San Francisco, Cal.]

Contract for Sale of Real Estate and Decree of Specific Performance both Void, if said Land is a Homestead, and the Owner's Wife was not a Party to Contract and Suit.—Thomas Barton, *et. al.* Respondents, v. E. F. Drake, Appellant, Supreme Court of Minnesota. Argument of appellant, 16 pages, respondent's brief, 50 pages, and appellant's reply, 21 pages. The following are the facts:

In February 1870, Thomas Barton, being the owner of 45½ acres of land, just outside of the city limits of St. Paul, and 19 town lots adjoining, within the limits, authorized one Hewitt as agent, to sell all of said property upon certain terms. In June, 1870, Hewitt negotiated a sale with the defendant, Drake, and gave him a memorandum of sale, which was acknowledged by Hewitt and Drake, and filed for record. The sale was repudiated by Barton, because before it was made, he had countermanded his order as to part of the property; and because the terms of the sale were not in accordance with his instructions. Drake brought suit against Barton for specific performance of the contract, and obtained decree in Nov., 1871. In February, 1872, the legislature extended the city limits of St. Paul, so as to include said 45½ acres. The present suit was commenced in March, 1873, by Barton, asking that the contract and decree be declared void, because the plaintiffs are husband and wife, because said 45½ acres are their homestead, because the wife was not a party to either contract or suit for decree, and because decree and memorandum throw a cloud upon their title. The court granted the relief asked, upon which defendant now appeals.

The appellant claims, 1st, that this action by the plaintiff, was not brought in the proper court, nor on sufficient grounds; 2d, that the court below erred in its judgment, because it was based on a statute which is unconstitutional; 3d, that it was not necessary to join the wife in either the contract or the suit; 4th, that it is lawful for an owner to sell his homestead; 5th, that no specific property had been selected as a homestead by Barton, at or prior to the commencement of the first suit; 6th, that at the time this action was brought, Barton was not entitled to exempt a greater quantity of land than one lot; and 7th, that Barton and his wife cannot now for the first time, bring in the claim of homestead exemption.

The respondents, on the other hand, contend: 1st, that, when these transactions occurred, the law of the state was in force, incapacitating owners of homesteads from alienating them without their wives' consent. 2d, that the 45½ acres of land in question, formed their homestead; 3d, that the authority given by Barton, to Hewitt, and sale made by the latter to Drake, were of no validity, conferred no interest on Drake, and gave him no right to have the sale especially enforced; 4th, that the decree of specific performance

cannot be enforced, because it was founded on transactions void as being prohibited by law; 5th, that the extension of the city limits in 1872, did not deprive the Bartons of any prior right to treat those transactions and that decree as invalid; and 6th, that the Bartons have still a right to so treat them.

The discussion is confined mainly to constitutional points, and is deeply interesting to lawyers in those states having provisions concerning homesteads similar to those in the constitution of Minnesota. The way of measuring land intended as a homestead, and the question what will constitute certain property a homestead, are likewise considered. Many cases are cited and the arguments are carefully drawn and worthy of study.

[Address E. C. Palmer, Esq., attorney for appellant, and W. P. Clough, Esq., counsel for respondents, St. Paul, Minnesota.]

Summary of our Legal Exchanges.

Rights of Riparian Proprietor as to Alluvium—Boundaries.—County of St. Clair v. Lovingston and the Wiggins Ferry Co., Supreme Court of the United States, opinion by Mr. Justice Swayne. 1. This case involves simply the application of old principles to facts about which, it should seem, there ought not to have been any controversy. Nevertheless the learned justice has, with his habitual patience and research, collected the following authorities, and from them deduces a canon of American jurisprudence that, "where the calls in a conveyance of land, are for two corners at, in, or on a stream or its bank, and there is an intermediate line extending from one such corner to the other, the stream is the boundary, unless there is something which excludes the operation of this rule by showing that the intention of the parties was otherwise:"—Preston v. Bowmar, 9 Wheat. 580; Newsom v. Pryor, 7 Wheat. 7; Barclay v. Howell, 6 Pet. 499; Baxter v. Evett, 7 Monroe, 333; Bruce v. Taylor. 2 JJ. Marsh. 160; Cockrell v. McQuinn, 4 Monroe, 62; Bruce v. Morgan, 1 B. Monr. 26; Churchill v. Grundy, 5 Dana, 100; McCullock v. Aten, 2 Ohio, 309; Handley v. Anthony, 5 Wheat. 380; Lamb v. Recketts, 11 Ohio, 311; Rix v. Johnson, 5 N. H. 520; Luce v. Charley, 24 Wend. 451; Jones v. Soulard, 24 How. 44; Schumier v. St. Paul, 10 Minn. 830 (?); Shelton v. Maupin, 16 Mo. 121; Railroad v. Schurmier, 7 Wall. 287. Applying this rule to the case in judgment, it is held that the Mississippi river constitutes the west line of the follow-surveys: Survey No. 519. "Beginning on the bank of the Mississippi river opposite to St. Louis, from which the lower window in the U. S. storehouse in St. Louis bears N. 70¾ W.; thence S. 5 west, 160 poles to *point in the river* from which a sycamore 20 inches in diameter bears S. 85 E., 250 links; thence S. 85 E., 130 poles (at 30 poles a slash) to a point; thence N. 15 W., 170 poles to a forked elm on the bank of the Cahokia creek; thence N. 85 W., 70 poles to the beginning." Survey No. 786. "Thence N. 85 deg. W. 174 poles, to a post *on the bank of the Mississippi river, from which, thence N. 5 deg. E., up the Mississippi river and binding therewith* (passing the southwesterly corner of Nicholas Jarrot's survey, No. 579, claim No. 99, at 6 poles), 551 poles and 10 links, to a post northwesterly corner of Nicholas Jarrot's survey, No. —, claim No. 100, from which a sycamore 35 inches diameter, bears S. 21 deg. W. 29 links; thence S. 85 deg. E. with the upper line of the last-mentioned survey 88 poles to the beginning." 2. The remaining question was, whether the riparian proprietor was entitled to the alluvium formed by artificial obstructions placed in the river above; and this question the court resolves in the affirmative, holding that it makes no difference as respects the right to such accretions whether they were formed by natural or artificial means; citing Hasley v. McCormick, 18 N. Y. 150. [For the opinion of the court below, see 5 Chi. Leg. News, 315.]

Jurisdiction of Federal Courts Over the Assets of a Deceased Person.—Yonley v. Lavender, Supreme Court of the United States, opinion by Mr. Justice Davis. [7 Chi. Leg. News, 154.] The substance of this important decision is, that the United States courts cannot execute judgments against the estates of deceased persons in the course of administration in the states, contrary to the declared law of the states on the subject. The learned judge says it is possible, but not probable, that state legislation on the subject of the estates of decedents may be purposely framed so as to discriminate injuriously against the creditor living outside the state; but if it should ever happen, the courts of the United States would find a way in a proper case to arrest the discriminations, and to enforce equality of privileges among all classes of claimants, even if the estates were seized by operation of law, and confided to a particular jurisdiction.

Penalty against National Bank for Taking more Interest than allowed by the Statute of a State—Jurisdiction of State and Federal Courts.—Miss. River Telegraph Co. v. First National Bank, Supreme Court of Illinois, January, 1875; opinion by Walker, C. J. [Chi. Leg. News, 158.] The following is the syllabus of this case. 1. The appellees were a corporation organized under the banking laws of Congress, which was located in the state of Iowa, and appellants were also a foreign corporation organized under the laws of Iowa. The first count in the declaration avers that the appellees, in violation of the laws of Congress, received from appellants interest over and above the rate allowed by the laws of Iowa, whereby, under the act of Congress, appellees became liable to pay to appellants double the sum received. The common counts were also added. *Held*, that the court below had no jurisdiction to try a case of the character shown in the first count of the declaration, it being for the recovery of a penalty imposed by the laws of another state, or of Congress, or of both. 2. That courts never execute the criminal or penal laws of another state or government; that the rule would be violated, as in this case it is averred that the transaction occurred beyond the limits of the jurisdiction of the courts in this state, that both the governments of the United States and Iowa are wholly independent of this state. They severally have all the attributes of sovereignty essential to the enactment and enforcement of laws for the government of their citizens within the limits of their constitutions, and in accordance with long settled rules of law, this state cannot enforce their penal laws. 3. That the act of Congress only confers jurisdiction upon the state courts in the state where the delinquent bank is situated. 4. That all the jurisdiction our courts exercise in such cases, results from the powers conferred by our constitution and laws, and not by any means from acts of Congress. And the same is true of the federal courts, as they derive all of their powers from the federal constitution.

Common Law Marriage.—Port v. Port, Supreme Court of Illinois opinion by Scholfield, J. [7 Chi. Leg. News 158.] In this case the court inclines to the opinion that inasmuch as the statute of Illinois does not prohibit or declare void a marriage not solemnized in accordance with its provisions, a marriage without observing the statutory regulations, if made according to the common law, will be a valid marriage. They also say, that by the common law, if the contract be made *per verba de presenti*, it is sufficient evidence of a marriage, or if it be made *per verba de futuro cum copula*. They comment on the evidence and hold that in this case there was not a valid marriage between the deceased and the appellant. The editor of the Legal News says: "This is the first time this important question has been decided by our supreme court. The doctrine laid down in this opinion is in accordance with the authorities." See Hutchins v. Kemmell, *ante*, 106, and cases cited.

CHICAGO LEGAL NEWS, FEBRUARY 13.

Liability of Stockholders in Private Corporations Under the Double Liability Clause in the Old Constitution of Missouri, and Under the Amended Constitution.—Ochiltree v. Iowa Railroad Contracting Co, Supreme Court of the United States, opinion by Mr. Justice Davis. [7 Chi. Leg News, 161.]

By the constitution of Missouri, adopted in 1865, a liability to double the amount of their stock was imposed upon stockholders in private corporations. This provision was changed by the amended constitution of 1870, so that the liability did not extend beyond the amount of subscribed and paid-up stock. This amendment has been construed by the supreme court of the state as applicable to all stockholders in corporations who became such by original subscription after the amendment took effect, and that it relieves such stockholders from the effects of the former constitution as to the payment of debts contracted before the amendment was adopted. In this case a suit having been brought against the corporation, and judgment obtained which proved unavailing, a proceeding was commenced under the statute of the state to enforce the double liability clause against the defendant in error, on the ground that it was a stockholder of the corporation at the time the execution was issued and returned *nulla bona*. *Held*, the defendant having become a stockholder in the corporation after the repeal of the double liability clause, by an original subscription of stock, for which it made full payment, it is not liable in double the amount of its stock for debts owing by the corporation prior to the repeal.

DAILY REGISTER (NEW YORK), FEBRUARY 20.

Action to Recover Assets of Corporation, in Whose Name Brought.—Allen v. N. J. Southern R. R. Co., Supreme Court of New York, Special Term, before Van Vorst, J.—An action to recover the assets of a corporation which are claimed to have been illegally and fraudulently disposed of, or converted by the trustees or directors, should be brought in the name of the corporation, the body which has directly sustained the injury.

LEGAL GAZETTE (PHILA., KING & BAIRD) FOR FEBRUARY 12.

Voluntary Subscription.—Winter's appeal, Supreme Court of Pennsylvania, Feb. 1, 1875, opinion by Sharswood, J. [7 Leg. Gaz. 52.] The decedent in his lifetime subscribed, with others, to a proposed fund for a theological seminary, but died before the subscription was paid, or the trustees of the seminary had accepted it. *Held*, that his estate was not liable.

Preferred Stock.—West Chester & Philadelphia Railroad Company v. Mary Jackson, Executrix of Gibbons Gray, deceased; Supreme Court of Pennsylvania, Feb. 1, 1875, opinion by Woodward, J. [7 Leg. Gaz. 53.]

By an act of Assembly of 1855, the West Chester Railroad Company was authorized to issue preferred stock, the holders to receive a dividend of 8 per centum on the par value. Gray subscribed and paid for thirty-six shares. By acts of 1870 and 1872 the stocks of the company were consolidated, and all the stockholders, excepting Gray and another, accepted the provisions of the act. Upon a suit brought by Gray to enforce payment of the dividends under the act of 1855, *the court held* that the original contract of Mr. Gray in purchasing the shares must be enforced, and he was entitled to the dividends as demanded.

LEGAL INTELLIGENCER (PHILA.,) FEBRUARY 19.

Defaulting Trustees—Assignment—Account.—Potter v. Hoppin, Philadelphia Common Pleas, opinion by Elcock, J [32 Leg. Int. 66.] This is a very long and interesting case. The four judges were equally divided, and the report of the master was therefore affirmed. The following is the syllabus:

Trustees guilty of a breach of trust, who have lost the trust assets, and who have assigned property of their own to another as security, or in trust for the benefit of the *cestuis que trust*, cannot have a decree for an account against such third person, without joining the *cestuis que trust* or restoring the trust assets. The assignee of such property, under such circumstances, becomes a trustee *de son tort*, and is accountable directly to the *centuis que trust*. A decree for an account cannot be had where defendants show a personal liability for what is asked. A distributee of purchase-money cannot dispute the purchaser's title.

LEGAL GAZETTE, FEBRUARY 19.

Marine Insurance—Reformation of Contract.—Equitable Insurance Company v. Hearne, Supreme Court of the United States, opinion by Mr. Justice Swayne. [7 Leg. Gaz. 58.] Where a party proposed to insurers to insure his vessel on a "voyage from Liverpool to Cuba and to Europe via Falmouth," at a rate named, and the company offered to insure at a somewhat higher rate, saying, "It is worth something, you know, to cover the risk at the port of loading in Cuba:" *Held*, that it was implied that "the port of loading" might be different from the port of discharge, and where the assured accepted this offer, and told the insurer to insure "at and from Liverpool to Cuba and to Europe via a market-port," etc., *held* further, that a policy which insured "to port of discharge in Cuba, and to Europe via a market-port," etc., did not conform to the contract, and was to be reformed so as to do so.

Jurisdiction of Federal Courts to Enforce Payments of Judgments Against Decedents' Estates.—Vonley v. Lavender, Supreme Court of the United States, opinion by Mr. Justice Davis. [7 Leg. Gaz. 58.] By the laws of Arkansas, all demands against deceased persons, which are not liens upon specific property before the death of the debtor, can only be collected by being brought under the administration of the probate court. Judgment may be obtained in other courts, but the debt is then remitted to the jurisdiction of the probate court. Du Bose died, and an administration was granted. During its pendency, a suit was brought by a non-resident of the state against the administrator, judgment obtained, and at a sale under an execution issued on the judgment, the plaintiff in error bought certain lands. An ejectment suit was brought by plaintiff in error against the administrator, to obtain possession of the lands. This suit resulted adversely to him. Upon writ of error the court sustained the judgment of the court below, *holding*—1. That the sale was invalid, the probate court being the only tribunal having jurisdiction of the payment of the debt or judgment.—2. A non-resident citizen stood exactly in the same position as a resident of the state, and the judgment in the United States Court was on no better footing than one in a state court.

Bankrupt Act—Fraudulent Preference—Divestiture of Lien.—Avery v Hackley, Supreme Court of the United States, opinion by Mr. Justice Davis. [7 Leg. Gaz. 60.] A valid lien is not divested by the mere fact of the holder of it subsequently taking a transfer of the equity of redemption made to him, with a view of giving to him a preference, and in violation of the bankrupt act. The transfer of the equity of redemption of course is void.

Certification of Foreign Records — Conclusiveness of Foreign Judgments.—Grant v. The Henry Clay Coal Co., Supreme Court of Pennsylvania, opinion by Paxson, J. [7 Legal Gaz. 61.] Under the act of Congress, of 1804, for the certification of foreign records, a record certified by the secretary of state of Massachusetts, is not required to have an additional certificate of that officer, that his original certificate is in due form. Where the officer who usually gives the latter certificate also gives the former, the second certificate is unnecessary. The court is bound by the decisions of the courts of another state, upon a matter relating to the organization of a corporation, under the statutes of that state.

Conditional Legacy.—Stover's Appeal, Supreme Court of Pennsyivania, opinion by Gordon, J. [7 Leg. Gaz. 61.] A bequest was made to a nephew, of an annuity to be paid to him "in person only, and upon his personal application therefor, and to no other person for him," and in case he "shall not for the space of five years apply in person for the payment of the said yearly sum, then each and every such annual sum uncalled for, to revert to and become part of" the residuary estate of the testator. The annuitant died without having made personal application as required. *Held*, that the legacy did not vest in him by the terms of the will, but was conditional upon his personal appearance and demand as set forth in the will.

Contract—Rules Posted in Factory.—Wright v. Trainer & Sons, Supreme Court of Pennsylvania, *per curiam*. [7 Leg. Gaz. 62] Where rules are pasted up in a factory, for the guidance of the operatives, if the rules are known to a parent when he hired his minor children to the owners of the factory, such rules become part of his contract.

NASHVILLE COMMERCIAL REPORTER, JAN. 28.

Duty of a Railroad Company, Where its Road Crosses a Public Road.—Nashville & Decatur R. R. Co. v. The State, Supreme Court of Tennessee, opinion by McFarland, J. The plaintiff in error was indicted for crossing a dirt road and obstructing it, and its charter required that in such cases it should make the crossing "as convenient as may be." The court say that this does not mean that the new road must be as convenient and easy of passage and as safe as the old road, but that the new road should be so constructed as to answer the purposes of the traveling public, and be made as easy and convenient as the nature of the ground will permit, having due regard to the rights of the public, and at the same time not requiring unreasonable outlays of money by the company.

Multifariousness—Publication—Impeaching Void Decree—Res Adjudicata.—Walker v. Day, Griswold & Co., Supreme Court of Tennessee, Sept. Term, 1874, opinion by Turney, J.—Under an original attachment bill, several lots were sold as the property of the defendant, and purchased by different purchasers. The defendant filed a bill against the complainants in the first-named bill, and the purchasers of said several lots and all claiming through or under them, to impeach the decrees rendered in said first-mentioned case, and to set aside the sales as absolutely void, on the ground that the defendant in that suit was not before the court and was not affected by the proceeding. *Held*, that the last-named bill was not multifarious. That the sales of the several lots was the result of a single proceeding, and that the purchasers made themselves parties to that proceeding by their purchases, and that they and those claiming through them, derived whatever rights or titles they may have, from that proceeding, which is the single fountain from which the claims of all the purchasers and those claiming through or under them flow. During the pendency of our late war, a bill was filed, and publication, in lieu of service of process on the defendant, was made on one side of the lines of the contending armies, and the defendant was on the other side of the lines. *Held*, that as all communication between parties on the opposite sides of those lines was prohibited, if not by legislation, by the more effective power of the force of arms, it could not be presumed that the published notice was seen by, or known to the defendant; that such publication did not bring the defendant before the court, and that he was not bound by the decrees rendered in the cause. The proceedings mentioned in Nos. 1 and 2 above, were under an original attachment bill against W., and the proceedings were regular on their face—the fact that W. was within the confederate lines at the date of the publication not appearing in the record. *Held*, that the decrees may be set aside by an original bill for that purpose. That the same rule applies as to a decree rendered in mistake or by accident, without fault or negligence on the part of the party aggrieved thereby, as in the case of a decree obtained by fraud; that under such a bill the existence of things directly contrary to the recitals of the decree sought to be impeached, may be shown; and that as the relief to which a party is entitled under such bill must depend on the nature of the fraud, accident or mistake, and the extent of its operation in obtaining an improper decree; and as W. was not before the court in the suit in which the proceedings sought to be impeached were had, the decrees rendered against him and the sales of his property under the same, were absolutely void. In the case above-mentioned, W. had, previously to filing his bill to set aside the decrees and the sales of his property under the same, brought actions of ejectment for the lots, one of which actions had been taken to the supreme court, where it had been held that as the proceedings against W., in the chancery court (a transcript of which had been read in evidence on the trial of the action of ejectment to defeat him), were regular on their face, they could not be attacked in that collateral proceeding by showing that W. was within the confederate lines at the time the publication was made. *Held*, that this decision of the supreme court was not a judgment upon the merits, the facts which make the sale void having been kept from view in that collateral proceeding—that said judgment is no bar to this *direct* proceeding to vacate the decrees and declare the sale void.

NASHVILLE COMMERCIAL REPORTER, JANUARY 7.

Assignment of Title-Bond.—Alcock, v. Patton, Supreme Court of Tennessee, opinion by Deaderick, J.—An assignment of a bond for title to land does not vest the assignee with the title. The land in such case remains subject to the debts of the original vendor if the bond is not registered.

Payment to Attorney in Depreciated Currency.—Glass v. Davidson, Supreme Court of Tennessee, opinion by Nicholson, Ch. J.—An attorney had a claim for collection, with instructions not to receive bank notes in payment of it, but these instructions were not known to the debtor, and the debtor paid the attorney the amount of the debt in the notes of the Bank of Tennessee, which the attorney refused to receive as a payment unless the creditor should ratify it, and the attorney agreed to inform the creditor of the facts, and if he did not ratify the payment and accept the bank notes, the attorney promised to return them to the debtor by a given time. The attorney did not return the bank notes, and the court holds that the payment was valid and binding, and that it extinguished the debt.

NASHVILLE COMMERCIAL REPORTER, DECEMBER 17.

Organization of Corporations in Chancery Court in Tennessee—Appeal.—Chadwell, *ex parte*, Supreme Court of Tennessee, Dec. Term, 1873.—The legislature, under the constitution, art. 11, sec. 8, can only provide by general laws for the organization of corporations, setting forth specifically in the act, all the rights, privileges, powers and liabilities of such corporations.—Under the above recited provision of the constitution, and the act of Jan. 30, 1871, the chancery court has only the power to organize such bodies corporate as the legislature shall, by general law prescribe, and to the extent pointed out. The power to organize corporations by the chancery court being merely ministerial, no appeal will be taken from the refusal of the chancellor to grant the power asked for in the petition.

DAILY REGISTER (NEW YORK), FEB. 17.

Parties in Suit by Stockholder.—Graves v. George, Supreme Court of New York, Special Term, before Van Vorst, J. To an action by a stockholder against the trustees or directors of a corporation for a conversion or misappropriation by them of corporate property, the corporation is itself a necessary party.

THE NASHVILLE COMMERCIAL REPORTER, FEBRUARY 14.

Mistake in Indictment—Homicide—Defence of Insanity.— Firby v. The State, Supreme Court of Tennessee, opinion by Deaderick, J. An indictment entitled "September Term, 1873," and which the record showed to have been returned into open court at the January term, 1874, will not vitiate the indictment, as the date in the caption is no part of the indictment. Evidence was offered to show the defendant was insane at the time the homicide was committed, and the defendant's attorney asked the court to charge the jury that if, from the evidence, they believe the defendant to be insane, they will so find, and upon such finding, the court will direct an order to the superintendant of the hospital for the insane, to receive and keep the defendant as others; and when in the opinion of the trustees and physician, the defendant has recovered, they would cause him to be removed to the county jail to be tried; but the circuit judge refused to charge as requested, and the court hold that this was not error, that a correct construction of the act of 1871, ch. 138, § 7 is, that its provisions apply to existing present insanity at the time of the trial, that if insane at the time of the killing, the defendant could not be convicted under the plea of not guity.

Privilege of Witness to Refuse to Testify before Grand Jury as to Gaming, on the Ground of Criminating Himself.— Hirsch v. State, Supreme Court of Tennessee, September Term, 1874, opinion by Sneed, J.—Hirsch was summoned before the grand jury to give evidence for unlawful gaming. He was asked if he knew of any persons playing at cards for a wager in the county within six months. He did not object to the form of the question, but refused to answer, because he said he could not answer without criminating himself. The court hold—that as he could not be indicted or prosecuted for any matter he might, in answer to the question, disclose criminating himself, he was bound to answer the question.—Question reserved. Whether the judgment of the court, ordering the witness to jail for refusing to answer the question, could be appealed from.

Legal News and Notes.

—JOHN L. TYLER, Esq, attorney at law and real estate agent, of Yankton, Dakotah, has just got out an interesting sheet on the resources of that territory.

—LEWIS TILLMAN, JR., has published a long and interesting article in the Nashville Commercial Reporter, on the Administration of Insolvent Estates in Chancery, under the provisions of the Tennessee Code.

—HON. ALLEN T. CAPERTON, the new Senator elect from West Virginia, is said to be a gentleman of rare legal attainments. He was a Confederate States Senator from Virginia, his colleague being R. M. T. Hunter.

—LADY BARRISTERS.—A letter from St. Petersburg, published in the Memorial Diplomatique of Paris, states that some ladies have formed a society with a view of qualifying themselves for the Bar, and demanding permission to plead after undergoing the prescribed examination.

—THE Memorial Diplomatique says the Egyptain International Appellate Court will consist of Mr. Scott, as the representative of England; Herr Lapenna, of Austria; Signor Giaccone, of Italy; Herr Scaroqua, of Germany; M. Cumassy, of Russia; Baron Anspeld, of Sweden; M. Devos, of Belgium, and Dr. Baringer, of the United States. The French member will not be appointed till the convention has been ratified by the assembly.

—DR. H. MEINERTSHAGEN, a member of the editorial staff of the Anzeiger des Westens, died recently in St. Louis. He was a man of eminent ability, and a lawyer by profession. He was born in Bremen, was highly connected, and was a judge of the Luebeck court. After coming to the United States he occupied the position of managing editor of a German daily paper in Pittsburg, and came West last summer. He was unmarried, and had no relatives in this country.

—THE Supreme Court of the United States adjourn from Friday, March 5, to Monday, March 22. Since the court assembled last fall an immense labor has devolved upon them, which has taxed each member, mentally and physically, to an extent nearly beyond endurance. Probably no court in the country is required to work so continuously and severely as this, the highest tribunal in the land. After the expiration of the recess the session will probably continue until May, and then the judges will leave for the circuit in the States to which they are assigned.—[*Washington Chronicle.*

—HERMAN FOSTER, a prominent lawyer of Manchester, N. H., died at his residence in that city on Wednesday, in the seventy-fifth year of his age. He was born at Andover, Mass., October 31, 1800. He received only a common school education, and after spending some years in a mercantile house in Boston, he studied law, and was admitted to the bar at Warner, in 1839. He practised his profession at Manchester with great success, and was sent to represent the city in the house of representatives of the State in 1855 and 1856, and again in 1868 and 1869, and was state senator in 1860 and 1861, being president of the senate in the latter year. In August, 1862, he was appointed by President Lincoln assessor of internal revenue for the second district of New Hampshire, resigning in February of the next year.—[*New York Herald.*

—THERE was lately an amusing example of the red-tape of bankruptcy in Pittsburg, Pa. The trustees of a bankrupt estate were paying creditors a dividend of ten per cent., amounting in all to $220,000. John E. James was a workman in the bankrupt's mill before it closed, and the firm was indebted to him $50.11. As James was an employee $50 was a preferred debt, and immediately paid, leaving eleven cents as a claim against the estate. James was therefore entitled to ten per cent. of eleven cents, which is one cent, as nearly as our currency will split. In order to settle this little balance according to law, six cents were paid out in notifying James, and a two cent stamp was put on the order to pay. The whole business was finished up with strict legality, and the check was worded so as to conform to the bankruptcy act. Eight cents were expended to produce one, according to law, and this is how the money goes when a man is thrown into the whirlpool of the courts to get his rights.—[*St. Louis Republican.*

—RAILWAY ACCIDENTS AND INSURANCES.—The case of Bradburn v. The Great Western Railway Company (31 L. T. Rep. N. S. 464; L. Rep. 10 Ex. 1), which has been recently decided by the Court of Exchequer, is of the greatest importance to all holders of accident insurance policies. The contention of the railway company was, that when a policy holder who sues them for damages resulting from an accident for which they are liable, has received from an accidental insurance company any money on account of the accident, that sum so received should be deducted from the sum at which the jury assess the damages. "One is dismayed," said Baron Bramwell, "at this proposition." In Dalby v. India and London Life Assurance Company (15 C. B. 365), it was decided that one who pays premiums for the purpose of insuring himself pays on the footing that his right to be compensated, when the event insured against happens, it is an equivalent for the premiums he has paid. "It is a *quid pro quo*, larger if he gets it, on the chance that he will never get it at all." To the same effect Baron Pigott observed that "the plaintiff is entitled to recover the damages caused to him by the negligence of the defendants, and there is no reason or justice in setting off what plaintiff has entitled himself to under a contract with third persons, by which he has bargained for the payment of a sum of money in the event of an accident happening to him." This puts the question in the right light, for it would certainly be curious if a railway company were allowed to take advantage of the precautions taken by the parties to whom it has caused damage.—[*Law Times.*